

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 SOLAS OLED LTD.) ()
5) (CIVIL ACTION NO.
6) (2:19-CV-152-JRG
7 VS.) (MARSHALL, TEXAS
8) ()
9 SAMSUNG DISPLAY CO.,) (SEPTEMBER 9, 2020
10 LTD., ET AL.) (10:27 A.M.

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10:27:17 1 COURT SECURITY OFFICER: All rise.

10:27:18 2 THE COURT: Be seated, please.

10:27:24 3 All right. Counsel, we'll continue the pre-trial

10:28:03 4 hearing in the Solas/Samsung case which we recessed after a

10:28:08 5 full day yesterday.

10:28:09 6 During the day yesterday, disputes arose between

10:28:14 7 the parties with regard to matters that were characterized

10:28:18 8 as requiring claim construction of the Court under 02 Micro

10:28:25 9 and similar precedent.

10:28:26 10 In an abundance of caution and to make ensure that

10:28:32 11 the Court fully discharges its obligation under the

10:28:35 12 guidance of the Federal Circuit, vis-a-vis 02 Micro, the

10:28:38 13 Court ordered targeted briefing by the parties overnight,

10:28:44 14 which I have received and reviewed. And I'm prepared to

10:28:48 15 hear very targeted argument on the matters raised in the

10:28:55 16 briefing and as a part of yesterday's pre-trial,

10:28:58 17 particularly "said active elements" and "covers."

10:29:02 18 In light of all that we have before us and the

10:29:12 19 limited time in which we have to accomplish it, I'm going

10:29:15 20 to give each side 10 minutes to argue this as set forth in

10:29:19 21 the overnight briefing, and then I'll attempt to give you

10:29:21 22 some guidance.

10:29:21 23 Let me hear from Solas first on these two issues.

10:29:27 24 MR. MIRZAIE: Thank you, Your Honor.

10:29:27 25 I have another slide deck, Your Honor. May I

10:29:45 1 approach?

10:29:46 2 THE COURT: You may approach.

10:30:03 3 All right. Counsel, let's proceed.

10:30:07 4 MR. MIRZAIE: Thank you.

10:30:08 5 So I'll begin with the first term, Your Honor, and

10:30:11 6 that's "said active elements." As you see here in Slide 2,

10:30:16 7 there's an agreed on construction for the term "active

10:30:19 8 elements." We discussed that yesterday. And it's circuit

10:30:22 9 elements that have gain or that direct current flow, e.g.,

10:30:26 10 for example, transistors.

10:30:29 11 I wanted to give you an overview of the claim, as

10:30:33 12 we did yesterday, to show where that antecedent basis is,

10:30:37 13 Your Honor. The antecedent basis is right there in the

10:30:43 14 first element and -- which says active elements, plural,

10:30:46 15 formed over said substrate. And there's four instances in

10:30:52 16 which there's referral back to that act -- the active

10:30:56 17 elements using the said active elements term.

10:30:59 18 Now, the parties are not disputing that Samsung's

10:31:03 19 products have seven transistors. All of them do. But the

10:31:08 20 parties are disputing whether the legal -- legal scope of

10:31:11 21 the claim requires that active elements or said active

10:31:15 22 elements requires a showing that the relevant claim

10:31:19 23 requirements for all seven transistors must be met in

10:31:24 24 Samsung's products. That's what the parties are disputing.

10:31:26 25 THE COURT: I understand. Samsung says, yes, and

10:31:28 1 you say, no.

10:31:29 2 MR. MIRZAIE: Correct. Samsung says, yes, despite
10:31:32 3 the fact that it's a comprising claim, the claim requires a
10:31:35 4 showing that the relevant claim requirements for active
10:31:38 5 elements is true -- is met for all seven transistors in
10:31:42 6 Samsung's products. And a showing as to two is not enough
10:31:46 7 if there are five additional ones where you can't meet the
10:31:49 8 relevant claim limitations.

10:31:50 9 We take the -- the opposite position, as you know.

10:31:53 10 So starting with what the parties do agree on,
10:32:01 11 Your Honor. The parties agree that the antecedent basis
10:32:05 12 term of "active elements" is two or more active elements.
10:32:10 13 So here on this slide, you see that -- as my colleague
10:32:14 14 stated yesterday, Dr. Fontecchio, their expert, agreed
10:32:17 15 that, quote, active elements, end quote, is met by two or
10:32:20 16 more active elements.

10:32:22 17 And he further agreed that Mr. Credelle points to
10:32:32 18 two active elements of the seven, T1 and T3.

10:32:36 19 So inserting that into the claim, what you see
10:32:39 20 here on Slide 10, Your Honor, is two or more active
10:32:42 21 elements. The parties agree to that.

10:32:44 22 The next instance of the term is said two or more
10:32:47 23 active elements.

10:32:48 24 And the third, which is the -- the element in
10:32:53 25 which this dispute was brought before the Court, it's said

10:32:56 1 two or more active elements.

10:32:59 2 The -- the exact position was clarified yesterday,
10:33:04 3 as you suggested. Samsung's counsel said that if there are
10:33:10 4 five in the products, all five must be met. You can't have
10:33:14 5 two active elements that meet the claim requirements and --
10:33:17 6 and three that don't.

10:33:19 7 Now, this is how Samsung is reading it, according
10:33:23 8 to their -- their agreement to what the dispute is. This
10:33:28 9 is the claim with the -- with the relevant limitations.
10:33:31 10 It's a display apparatus comprising two or more active
10:33:36 11 elements in the first -- in the first limitation.

10:33:41 12 Getting to the third limitation, the way that they
10:33:43 13 read it, just using what they represented in the briefs and
10:33:46 14 to the Court yesterday, two or more active elements is not
10:33:49 15 enough. It has to be that there are no additional active
10:33:55 16 elements that don't meet those claim requirements. They
10:33:58 17 made that clear in their representation to the Court
10:34:01 18 yesterday and in their briefs again last night.

10:34:03 19 Another way to view what Samsung is proposing here
10:34:07 20 is in -- black letter law on exactly how they're reading
10:34:12 21 this claim that two is not enough for that second instance
10:34:18 22 of said two or more active elements is that there are no
10:34:22 23 additional active elements. That's the very definition of
10:34:27 24 applying a consisting of or a comprising only of, instead
10:34:32 25 of comprising.

10:34:33 1 That is exactly the universal definition of those
10:34:40 2 transitional phrases under patent law.

10:34:42 3 Another way to view it is that if it's not about
10:34:48 4 said active -- active elements, the first instance of
10:34:51 5 active elements can only be met so long as there are no
10:34:55 6 additional active elements that don't meet the claim
10:35:01 7 limitations.

10:35:02 8 THE COURT: All right. You've used about half of
10:35:04 9 the time, counsel. Let's go on to cover, unless you have
10:35:11 10 something that you need to add.

10:35:12 11 MR. MIRZAIE: Yes, I just wanted to add that not
10:35:15 12 only, as we talked about yesterday, is that a violation --
10:35:20 13 Samsung's proposal for active elements and said active
10:35:23 14 elements a violation of the universal term of patent law
10:35:26 15 convention by -- by violating comprising of, it's also,
10:35:31 16 Your Honor, a violation of this Court's constructions --
10:35:33 17 this Court's instructions to the jury, rather.

10:35:36 18 On Slide 26, we show an example of this Court's
10:35:39 19 consistently-applied instructions to the jury, and we
10:35:41 20 provide an example. And it would violate that instruction.
10:35:44 21 So one way or another, we believe that Samsung's position
10:35:48 22 must be rejected; otherwise, it will violate one or more
10:35:52 23 rules.

10:35:52 24 And their attempt to distinguish the Gillette case
10:35:56 25 fails. The Gillette case is directly on point. In that

10:36:00 1 case, there were a group of three blades --

10:36:04 2 THE COURT: I'm familiar with the Gillette case.

10:36:07 3 MR. MIRZAIE: Thank you. I'll move on to the

10:36:08 4 second term, Your Honor.

10:36:09 5 There -- the last point I'll make, actually, is

10:36:16 6 that their reasons for violating the universal patent

10:36:20 7 convention don't hold up. There's no caselaw supporting

10:36:23 8 that the purpose of the invention -- A, it's not the

10:36:26 9 purpose of the invention; but, B, even if it were, it does

10:36:30 10 not overcome the universal convention here. Neither does

10:36:33 11 all embodiments showing it.

10:36:34 12 Okay. So cover. Here's the dispute as to cover,

10:36:38 13 Your Honor. It was captured yesterday by Your Honor. They

10:36:41 14 say it means entirety of the item must be covered, 100

10:36:45 15 percent.

10:36:45 16 And we say it doesn't have to be 100 percent so

10:36:48 17 long as it is formed as to cover, as the claims state.

10:36:56 18 Formed as to cover, it just has -- it has to lie on the

10:36:59 19 surface of, consistent with the plain meaning. It does not

10:37:04 20 have to be 100 percent.

10:37:05 21 Now, what the parties agree on -- I think it's

10:37:09 22 important to --

10:37:09 23 THE COURT: You're telling me that both sides

10:37:11 24 agree that cover should be construed for the same use in

10:37:14 25 all instances?

10:37:15 1 MR. MIRZAIE: That's -- that's also what I'm
10:37:17 2 telling you, Your Honor. And it makes sense. There's --
10:37:20 3 there's four instances of cover in this claim. The Federal
10:37:24 4 Circuit law is quite clear that there's a strong
10:37:28 5 presumption that the term should be applied with the same
10:37:30 6 exact meaning each time it shows up.

10:37:34 7 This is a really important point, Your Honor.

10:37:38 8 THE COURT: So cover means the same thing when
10:37:40 9 used for first electrode, insulation film, second
10:37:45 10 electrode, and OE layer?

10:37:47 11 MR. MIRZAIE: Correct.

10:37:48 12 THE COURT: Okay.

10:37:48 13 MR. MIRZAIE: And the reason this is an important
10:37:51 14 point, Your Honor, is that Samsung's position -- it's
10:37:56 15 actually threefold for -- for why we can't be right about
10:37:59 16 what cover means, why it requires a hundred percent
10:38:03 17 coverage.

10:38:03 18 Their first one is that the object of the
10:38:06 19 invention is to -- is to prevent light -- prevent a hundred
10:38:12 20 percent of the light from coming into the transistor, and
10:38:14 21 that the term "cover," therefore, must be interpreted in
10:38:18 22 light of this patent and the, quote, unquote, object of the
10:38:22 23 patent in order to prevent a hundred percent of light.

10:38:25 24 The problem with that, Your Honor -- as you just
10:38:29 25 noted, the other three instances in which the term "cover"

10:38:32 1 is used are inconsistent with that -- that argument.

10:38:38 2 They -- they -- that premise is false in light of -- of
10:38:41 3 that issue.

10:38:44 4 THE COURT: Let me ask you this, counsel.

10:38:46 5 MR. MIRZAIE: Yes.

10:38:46 6 THE COURT: Your briefing from overnight indicated
10:38:49 7 that you believed cover should be construed to be lie on
10:38:52 8 the surface of. Are you now telling me that it should be
10:38:58 9 construed to be formed on as an alternative or a -- a
10:39:03 10 different construction than lie on the surface of?

10:39:06 11 MR. MIRZAIE: We believe that the two are
10:39:08 12 interchangeable, Your Honor, because the -- the plain
10:39:10 13 meaning of cover and giving context with the contextual
10:39:15 14 claim language formed on so as to cover, the plain meaning
10:39:17 15 of that is to lie on the surface of. We showed that
10:39:21 16 through the intrinsic record, which repeatedly references
10:39:24 17 the problem solved in the background of the invention to be
10:39:27 18 creating extra surface area, Your Honor. And extra surface
10:39:32 19 area for light emission is created just -- just to form it
10:39:35 20 on the layer above.

10:39:36 21 The dictionary definitions we provided also show
10:39:38 22 that it has to lie on the surface of.

10:39:39 23 None of those things show a hundred percent
10:39:42 24 coverage.

10:39:44 25 And so the second argument that Samsung makes,

10:39:51 1 Your Honor, is that the plain meaning in light of the
10:39:54 2 patent is that cover must require 100 percent coverage.

10:40:00 3 But that fails for the same reasons, Your Honor.

10:40:03 4 The plain meaning can't be limited that way for
10:40:06 5 the same reasons. Every instance of cover in the claims
10:40:12 6 can't be read that way. Why do we know that? Because
10:40:14 7 every instance -- some of the instances would contradict
10:40:18 8 that very premise, Your Honor.

10:40:21 9 In the patent at Column 6, Lines 39 through 44; 8,
10:40:30 10 57 through 30 -- 62; and 15, 16 through 22, it actually
10:40:34 11 says, Your Honor, that the one or more of the electrode
10:40:39 12 layers is transparent. Therefore, all instances of cover
10:40:44 13 cannot be read to prevent light from entering the -- that
10:40:50 14 layer.

10:40:50 15 The claims also make another thing clear, Your
10:40:55 16 Honor. The claims here -- as you can see, none of the
10:40:58 17 other claim limitations here on Slide 38 say anything about
10:41:04 18 preventing light. And even on the element in which this
10:41:09 19 dispute was brought to Your Honor, which is that second
10:41:12 20 element, it's clear that cover is not the -- the claim term
10:41:18 21 that requires preventing light.

10:41:25 22 It's a separate requirement that merely requires
10:41:27 23 that the material in which the first electrode is made of
10:41:30 24 shields visible light. They don't dispute that that's met
10:41:34 25 in the product. So the material has to be light shielding,

10:41:38 1 but there's no suggestion that cover has to be the term to
10:41:40 2 prevent a hundred percent of the light.

10:41:42 3 And, furthermore, Your Honor, their expert
10:41:46 4 admitted through cross-examination that the cover element
10:41:50 5 itself does not require shielding light.

10:41:53 6 Their final argument, which is that all
10:41:57 7 embodiments of the invention support their construction is
10:42:03 8 also wrong. That's not the law. We agree that the plain
10:42:08 9 meaning applies. All embodiments, the Federal Circuit
10:42:12 10 tells us, cannot change the plain meaning. The only thing
10:42:16 11 that can is a disclaimer or lexicography, and there is not
10:42:21 12 a disclaimer or lexicography here, Your Honor.

10:42:24 13 So we have a situation where the plain meaning,
10:42:27 14 the intrinsic record, and the extrinsic record all point in
10:42:33 15 the same direction, which is that Samsung's overly narrow
10:42:38 16 requirement that the -- the term "cover" be interpreted
10:42:42 17 to -- to entirely cover -- or 100 percent cover, it must be
10:42:48 18 rejected. It's narrower than the plain meaning. It's
10:42:51 19 inconsistent with the intrinsic record, which only refers
10:42:54 20 to being formed over the surface of, Your Honor.

10:42:58 21 THE COURT: Now, previously to distinguish prior
10:43:01 22 art, didn't Solas or its predecessor use "placed above" to
10:43:09 23 address this concept?

10:43:10 24 MR. MIRZAIE: So in the file history, and I'm
10:43:13 25 showing that on Slide 42 here, they -- what they used

10:43:19 1 here -- this is the file history, and we have this as
10:43:23 2 Exhibit 1 to the brief last night, Your Honor. This is the
10:43:25 3 only place in which cover is mentioned, the term at issue,
10:43:30 4 to distinguish art.

10:43:32 5 It's telling, Your Honor, because the explanation
10:43:35 6 from the patentee on that term "cover" completely supports
10:43:40 7 Solas's position here, which is that cover means formed
10:43:46 8 above or lie on the surface of, consistent with its plain
10:43:50 9 meaning, because doing so frees up the light emission layer
10:43:56 10 from being on the same level as the transistors so that
10:44:03 11 more surface area can be used to emit light.

10:44:06 12 It explains, consistent with our plain -- plain
10:44:10 13 meaning, that it merely has to be formed above so that it's
10:44:13 14 not at the same level of the transistors because the
10:44:17 15 transistors take up the surface area in the prior art.

10:44:21 16 And so this prosecution history, the only places
10:44:25 17 where cover is mentioned perfectly aligned with our
10:44:29 18 construction and contradicts Samsung's narrow one. Cover
10:44:34 19 does not require a hundred percent merely covering, and it
10:44:39 20 merely requires forming it above so that it's above the
10:44:44 21 transistors, and the transistors don't interfere with the
10:44:48 22 surface area of emitting light, Your Honor.

10:44:51 23 THE COURT: All right. Let me hear a response
10:44:55 24 from Samsung.

10:45:04 25 Mr. Lerner, I'm going to ask you to confine your

10:45:07 1 arguments to the same approximate 10-minute time frame.

10:45:11 2 MR. LERNER: Okay, Your Honor. Thank you.

10:45:14 3 Thank you, Your Honor. Jeff Lerner for

10:45:31 4 Defendants.

10:45:32 5 The meaning of said is agreed. It means "the."

10:45:36 6 The meaning of active elements, that's where we may differ

10:45:40 7 from the Plaintiffs. We -- the term has a construed

10:45:44 8 meaning, and that's agreed to. But active elements is an

10:45:47 9 unbounded number. It is not two or more.

10:45:49 10 And the confusion is it would permit a display

10:45:53 11 that has two active elements, but if a display has more

10:45:57 12 active elements, if it has three, then all of those --

10:46:01 13 everything -- every element of the display that is a

10:46:03 14 circuit element that has gain or that directs current flow

10:46:06 15 is an active element. And it's that set of active elements

10:46:10 16 that has to be covered by the first electrode. That's the

10:46:13 17 clear import of the claim language. It's the clear import

10:46:17 18 of the specification.

10:46:17 19 The whole point of the claimed invention is

10:46:21 20 uncovered transistors will malfunction because light will

10:46:28 21 hit them. That's what distinguished the prior art. And it

10:46:31 22 would make no sense to have a -- a structure in which some

10:46:34 23 of the transistors were uncovered.

10:46:36 24 The --

10:46:37 25 THE COURT: Why do all the active elements in the

10:46:40 1 accused device have to be mapped to the claim? Tell me
10:46:45 2 why.

10:46:45 3 MR. LERNER: Because the claim uses the term
10:46:47 4 active elements of unbounded number. It's a display
10:46:50 5 apparatus comprising. We're talking about a display
10:46:53 6 apparatus. We're not talking about things outside the
10:46:57 7 display. And in the display, what meets the definition of
10:47:00 8 an active element is in that set of active elements. And
10:47:03 9 it's that set of active elements that, therefore, has to be
10:47:07 10 covered by the first electrode.

10:47:08 11 THE COURT: But, I mean, if this is a comprising
10:47:11 12 claim, it can clearly contain other items. And what's to
10:47:15 13 say there are not active elements within those other items
10:47:18 14 that don't have to be treated in the way as the active
10:47:23 15 elements do that are the basis of the claim, if that makes
10:47:28 16 sense?

10:47:32 17 MR. LERNER: We're not talking about active
10:47:35 18 elements outside of the display area. So the active
10:47:37 19 elements are what the patent is talking about. And what
10:47:39 20 the patent says is that you have to cover them to prevent
10:47:41 21 the malfunction.

10:47:44 22 THE COURT: Well, the display device is an
10:47:46 23 embodiment. It's a product. I'm talking about the
10:47:51 24 language of the claim itself, which in this case applies to
10:47:55 25 this particular embodiment but is certainly not limited to

10:47:59 1 this particular embodiment. I mean --

10:48:01 2 MR. LERNER: You're correct, Your Honor. But
10:48:04 3 active elements is a recited claim element, and that's why
10:48:08 4 yesterday I went over the Federal Circuit caselaw saying
10:48:11 5 comprising does not permit abrogation or negation of claim
10:48:14 6 elements. If we're talking about a passive element, that's
10:48:17 7 a different story.

10:48:18 8 But this claim is saying active elements. And as
10:48:20 9 we pointed out in our briefing last night, if you look at
10:48:22 10 the patent and the figures, they have numerous examples
10:48:25 11 with more than two transistors. And they're all covered
10:48:28 12 because any malfunction will cause the display to
10:48:32 13 malfunction, and any accused products -- if the active
10:48:36 14 elements malfunction, the display wouldn't work right.
10:48:40 15 That's why all have to be covered. And the claim language
10:48:42 16 is consistent with that purpose.

10:48:43 17 There's no intrinsic evidence for the Plaintiff's
10:48:46 18 position, and it would be inconsistent with the purpose of
10:48:50 19 the claimed invention. As we pointed out in the summary of
10:48:53 20 the invention, when it talks about the purpose of coverage
10:48:58 21 to block light, it talks about the active elements. It
10:49:02 22 doesn't say some of the active elements or at least two.
10:49:04 23 And if you --
10:49:05 24 THE COURT: Let me stop you because I'm not sure
10:49:07 25 that we're clearly communicating.

10:49:09 1 My -- my question is this. Within the
10:49:13 2 open-endedness of a comprising claim, can't there be active
10:49:19 3 elements outside of the claim? In other words, the recited
10:49:27 4 active elements are one thing, but can't there be unrecited
10:49:31 5 active elements within the openness of a comprising claim
10:49:36 6 that don't have to be treated the same way?

10:49:38 7 MR. LERNER: Well, Your Honor, there's no
10:49:39 8 numerical limit on active elements. And that's why if
10:49:43 9 something --

10:49:43 10 THE COURT: Exactly.

10:49:44 11 MR. LERNER: -- is an active element, then it
10:49:46 12 falls within this claim limitation, active elements. That
10:49:49 13 I think is how we read the claim. That's consistent with
10:49:51 14 the purpose of the invention and we believe the plain
10:49:54 15 meaning.

10:49:55 16 And there's also Federal Circuit caselaw that even
10:49:58 17 if you could treat something as unrecited, you can't have
10:50:01 18 something that's inconsistent with the image --

10:50:03 19 THE COURT: Well, I agree with you that they're
10:50:05 20 not active element 1, active element 2, active element 3 in
10:50:09 21 the claim language. But there's active element regarding
10:50:12 22 the first electrode. There's active element regarding the
10:50:16 23 insulation film, the second electrode, and the OE layer.
10:50:19 24 And those appear to be the recited active elements.

10:50:26 25 Beyond those four, could there not be other active

10:50:29 1 elements within the open-ended application of a comprising
10:50:32 2 claim?

10:50:32 3 MR. LERNER: Your Honor, those are all referring
10:50:35 4 back to the same active elements. It's just saying you
10:50:38 5 have a substrate with active elements. The first layer
10:50:41 6 over that is this insulation film. Over that is the first
10:50:45 7 electrode. It's referring back each time to the same
10:50:48 8 active elements.

10:50:48 9 And, in fact, you would have to cover them with
10:50:50 10 the insulation film, or they were would short. I think
10:50:55 11 that's supports our position that -- that active elements
10:50:57 12 is referring to all of them, not just some subset. And
10:51:01 13 there'd be no basis in the claim to determine which ones
10:51:04 14 matter and which don't.

10:51:05 15 If you have a -- a multi-pixel display, as most
10:51:10 16 displays are, it wouldn't make sense to say you could have
10:51:13 17 two transistors in any one pixel that are covered when the
10:51:17 18 other ones are not. And that would be the reading of
10:51:22 19 comprising, since this claim is to a display apparatus.

10:51:25 20 That's -- that's -- we believe the claim language
10:51:29 21 is consistent with the very clear disclosure that the
10:51:32 22 active elements must be covered. And the figures, like
10:51:36 23 Figure 21, Figure 13, Figure 14, where they show multiple
10:51:40 24 active elements -- more than two active elements, they're
10:51:44 25 all covered because they need to prevent the malfunction.

10:51:47 1 And it's -- the recited element of the claim,
10:51:51 2 active elements, anything that's a circuit element in the
10:51:54 3 display that has gain or that directs current is an active
10:51:58 4 element. And it's that set that we believe is picked up by
10:52:02 5 a set. That's -- that's how we reach our conclusion, Your
10:52:04 6 Honor.

10:52:04 7 THE COURT: All right. Why don't we transition to
10:52:06 8 your position on cover?

10:52:07 9 MR. LERNER: So for cover, again, the intrinsic
10:52:11 10 evidence we laid out in our submission last night, we --
10:52:13 11 we believe strongly supports our position. Formed so as to
10:52:18 12 cover is terminology used repeatedly in the patent, in the
10:52:22 13 specification, and in the claims. And in every instance
10:52:24 14 it's used, it's to cover the entirety of the object.

10:52:28 15 When something is else is intended, there's
10:52:31 16 different language that's used that specifies what portion
10:52:35 17 is not covered.

10:52:35 18 And so when the claims say formed so as to cover,
10:52:38 19 they're talking about covering the object.

10:52:45 20 To clarify a couple of points, we're not arguing
10:52:49 21 that cover -- the term means blocked light. We're -- the
10:52:55 22 term "first electrode" is formed so as to cover. The claim
10:52:55 23 proceeds to say: And it's made from a material that
10:52:55 24 shields light.

10:52:59 25 So to block light, you have to have two

10:53:02 1 conditions. First you have to cover something. And that
10:53:04 2 coverage has to be with a material that blocks light.
10:53:07 3 But we're not saying the term "cover" means
10:53:12 4 blocked light. When the electroluminescent material covers
10:53:12 5 the active elements, that's talking about the broadness,
10:53:17 6 because the point of the invention is you want to expand or
10:53:21 7 enlarge your light-emitting area.
10:53:24 8 And so the -- the other point is the Plaintiff's
10:53:28 9 argument would render the claim language superfluous.
10:53:34 10 They're saying now that cover means to be -- to lie over,
10:53:41 11 to be placed over. And we saw in the spec -- in the
10:53:45 12 prosecution history, Your Honor, mentioned, it says:
10:53:48 13 Placed over the active elements so as to cover.
10:53:51 14 If placed above was all that cover meant, that
10:53:54 15 would be entirely superfluous. Likewise in the claims, an
10:53:59 16 insulation film formed over said substrate so as to cover.
10:54:03 17 It's already telling you it's formed over, it lies above.
10:54:07 18 So as to cover has to do extra work. And what it's telling
10:54:11 19 you is it is covering the other element.
10:54:13 20 At least one first electrode formed on said
10:54:16 21 insulation film so as to cover said active elements. It's
10:54:20 22 all they're telling you. If placed above, it lies over.
10:54:20 23 The additional work "so as to cover" does is it tells you
10:54:24 24 that object is covered.
10:54:25 25 And the -- really what the Plaintiffs are doing is

10:54:28 1 taking the improper Texas Digital approach looking at a
10:54:33 2 general purpose online dictionary from now, not looking at
10:54:36 3 the intrinsic evidence, which is agreed. It's talking
10:54:38 4 about preventing light from hitting the active elements,
10:54:42 5 and that requires covering the active element as such.
10:54:45 6 That's what's shown in the specification repeatedly.
10:54:49 7 There's no counter example to that. That's what it means
10:54:53 8 to form on so as to cover.

10:54:54 9 And the position they advance would also make
10:54:56 10 no -- it would leave unanswerable how much coverage. How
10:55:01 11 much is enough? They're saying cover means partially
10:55:06 12 cover. To what extent? The patent doesn't say because
10:55:09 13 when it's talking about cover, it's talking about the
10:55:11 14 entirety of the object.

10:55:12 15 So they don't cite any intrinsic evidence that
10:55:15 16 supports them. I don't think it's necessary to get into
10:55:18 17 how the term "cover" and its different uses was used in
10:55:21 18 different patents, which is one of their arguments.

10:55:24 19 And if you look in the dictionary, cover is a
10:55:26 20 transitive verb, has a number of different uses. One, if
10:55:29 21 you want to use a dictionary definition, is envelop, and
10:55:32 22 that's what the claims are talking about here. If you
10:55:36 23 cover the hatch of a submarine before it dives, you're not
10:55:39 24 going to let water in by having it half open. In this
10:55:46 25 case, too, for optics, when you cover to prevent light from

10:55:47 1 hitting it, that means you're covering the entirety.

10:55:47 2 And we think a very good example in the

10:55:51 3 specification is when it talks about covering a cathode

10:55:54 4 with an insulation film to prevent oxidation. If not all

10:55:58 5 of it was covered, that oxidation wouldn't be prevented.

10:56:03 6 And it's a very clear instance where the specification is

10:56:05 7 using cover to support -- to indicate that the entire

10:56:08 8 object is being covered.

10:56:09 9 So we don't believe there's any support in the

10:56:15 10 specification. It would be contrary to the invention to

10:56:18 11 have mere partial coverage. And the -- the proposal that

10:56:23 12 Plaintiffs have made now would also render superfluous

10:56:27 13 other claim language because formed over so as to -- formed

10:56:30 14 over already says it lies over and above. So as to cover

10:56:35 15 has to do different work.

10:56:37 16 Now, Renishaw, the Federal Circuit made clear, the

10:56:40 17 claim that stays true to the language -- the construction

10:56:43 18 that stays true to the language and the purpose of the

10:56:45 19 invention is the right one.

10:56:46 20 I think there's no doubt what the purpose of the

10:56:49 21 invention was here. It was to prevent light from hitting

10:56:52 22 these active elements. It would make no sense to say a

10:56:55 23 mere part, an undefined part, 1 percent, 2 percent, 20

10:57:00 24 percent, would be enough. And there's nothing in the

10:57:01 25 patent that would answer how much is enough. The claim

10:57:05 1 would be wholly indefinite under such an approach.

10:57:10 2 So for that reason, we believe the meaning of

10:57:15 3 cover in this patent is that the entire object is covered.

10:57:16 4 THE COURT: All right. Thank you, Mr. Lerner.

10:57:17 5 Well, having reviewed your briefing and having

10:57:24 6 heard your argument and being cognizant of the fact that

10:57:34 7 the progression of this case to trial is largely affected

10:57:44 8 by the guidance that I'm going to give you here, I don't

10:57:48 9 think that the Court has the luxury of taking this under

10:57:54 10 advisement for a lengthy period of time or really any

10:57:58 11 length -- any additional length of time.

10:58:00 12 As I said yesterday, the unexpected advent of a

10:58:13 13 claim construction issue requires effectively the Court to

10:58:16 14 throw an emergency brake on the train of both the pre-trial

10:58:23 15 disputes and the upcoming jury selection and trial.

10:58:26 16 So having thrown that emergency brake yesterday,

10:58:33 17 required the briefing, heard the argument, it's incumbent

10:58:34 18 on the Court to get the train moving again as quickly as

10:58:38 19 possible.

10:58:38 20 So with that in mind, I'm advising the parties as

10:58:43 21 follows: Said active elements is not, in my view, a claim

10:58:49 22 construction issue. I reaffirm the

10:58:55 23 agreed-upon-by-the-parties and adopted-by-the-Court

10:58:59 24 construction of active elements.

10:59:00 25 Within the open-endedness of this comprising

10:59:03 1 claim, the Court holds that the Plaintiff in this case is
10:59:09 2 allowed to map the claim to a subset of the active elements
10:59:14 3 in the accused devices as long as it's two or more.

10:59:19 4 And I reject the position of Samsung that said
10:59:25 5 active elements requires mapping the claim to all active
10:59:33 6 elements, no matter how many there might be.

10:59:36 7 With regard to the word "cover," I do concede that
10:59:44 8 this needs specific construction from the Court for the
10:59:52 9 parties to go forward. And while there is support for both
10:59:55 10 of the positions taken by the parties, the Court's
10:59:58 11 persuaded that the preponderance of the authority and
11:00:10 12 evidence leads the Court to construe "cover" to mean "lie
11:00:18 13 over the surface of."

11:00:23 14 And I reject Samsung's position that cover must
11:00:28 15 include "covering the entirety of an active element."

11:00:40 16 Now, with that being completed, we'll return to
11:00:46 17 the remaining dispositive motions that have yet to be dealt
11:00:52 18 with by the Court as a part of the pre-trial hearing in
11:00:54 19 this case.

11:00:54 20 And next I'll take up Plaintiff's motion to strike
11:01:10 21 portions of the expert report of Christopher Martinez.

11:01:15 22 Let me hear from the Plaintiff on this.

11:01:19 23 MR. HOFFMAN: May I have the document camera,
11:01:36 24 please?

11:01:36 25 Your Honor, Adam Hoffman for Solas.

11:01:37 1 I think this has been extensively briefed, so I
11:01:41 2 just wanted to hit a couple of -- of important points,
11:01:45 3 particularly admissions in the briefing by Samsung.

11:01:47 4 In terms of the comparability of the licenses, and
11:01:53 5 I'm not going to talk about the named licenses so that we
11:01:59 6 don't have to seal the Court, but in terms of the
11:02:02 7 comparability of the licenses upon which Mr. Martinez
11:02:06 8 relies, there just is no economic comparability analysis in
11:02:09 9 his opinion.

11:02:10 10 Most of the time, we would agree that disputes
11:02:14 11 between experts should be handled by cross-examination, but
11:02:18 12 there is a low bar to cross. There has to be actual
11:02:20 13 analysis, especially when we're talking about settlements
11:02:24 14 because there's an inherent issue with settlements that
11:02:28 15 there are reasons why they're not -- or reasons why they
11:02:31 16 may not be comparable to the hypothetical negotiation,
11:02:33 17 which I would say is not a settlement situation. So it has
11:02:37 18 to be addressed.

11:02:38 19 The only place where Mr. Martinez addresses it at
11:02:49 20 all is he states, as is admitted by Samsung in its briefing
11:02:51 21 at DI, 205 at 2, its sur-reply, the only place he addresses
11:02:52 22 it is to say, the cost of litigation may be an input.
11:02:56 23 That's just an identification of the problem we're talking
11:02:59 24 about. That's not an analysis of how he's dealing with it.
11:03:04 25 He's has to either explain, well, if it may be an input,

11:03:09 1 why is it comparable? Are you saying that's not relevant
11:03:13 2 here? Are you saying that I'm adjusting my opinion? Just
11:03:15 3 saying that he recognizes the settlement is not an
11:03:18 4 analysis.

11:03:18 5 And that's true throughout his comparability --
11:03:20 6 economic comparability opinion.

11:03:23 7 In its briefing at -- at Docket 164 at 5, its
11:03:31 8 opposition, Samsung states that Mr. Martinez addresses
11:03:36 9 economic comparability by concluding that quote, the
11:03:40 10 licenses were objective market indicators, and, quote,
11:03:40 11 presumably in good faith. Those are just presumptions. To
11:03:46 12 just say, I'm presuming that this agreement is made in good
11:03:49 13 faith, and I'm presuming that it's a market indicator, and,
11:03:53 14 therefore, it's comparable is not an economic analysis.

11:03:56 15 It's just a presumption.

11:03:57 16 And, importantly, they're citing there to his
11:04:00 17 deposition, so it's not even a presumption that he actually
11:04:03 18 provided in his Rule 26 report.

11:04:05 19 Finally, on this issue of comparability, we'd just
11:04:09 20 like to point out -- you know, on Page 10 of our brief at
11:04:13 21 Footnote 2, we note that Mr. Martinez also has a separate
11:04:20 22 set of lump-sum licenses in Schedule 12 of his report. He
11:04:25 23 also talks about them in Paragraph 138 to 139 where he
11:04:29 24 admits that these are lump-sum agreements that are
11:04:33 25 non-comparable.

11:04:34 1 They didn't oppose this part of the brief at all,
11:04:37 2 I don't believe. I don't believe they addressed it at all.
11:04:37 3 So we think that that at the very least is -- is an
11:04:40 4 undisputed part of the dispute. And, certainly, it
11:04:42 5 shouldn't be the case that Mr. Martinez should be able to
11:04:44 6 present to the jury lump-sum amounts in agreements that he
11:04:49 7 says are not comparable. He may be arguing that the fact
11:04:52 8 that they are lump sums is relevant to the form of license,
11:04:56 9 but he should not be permitted to show to the jury a
11:05:00 10 number -- a royalty that he does not think is comparable,
11:05:03 11 and there doesn't seem to be any dispute that -- that he
11:05:08 12 doesn't -- about that issue.

11:05:10 13 In terms of the -- the cost analysis where
11:05:14 14 Mr. Martinez relies on a single document to argue what the
11:05:18 15 price of the SSPPU should be, they argued, first of all,
11:05:24 16 that he's not really required to meet any requirements
11:05:26 17 under Daubert because it's a rebuttal argument, and he's
11:05:29 18 just criticizing Mr. Dell. There's no rule that somehow
11:05:33 19 the rules applying to experts disappear because it's a
11:05:37 20 rebuttal argument.

11:05:40 21 And when they say they're just sort of showing
11:05:42 22 that Mr. Dell's numbers are too big, they're not really
11:05:46 23 talking about the price of the SSPPU.

11:05:48 24 As we pointed out, this is his schedule. And
11:05:55 25 where it says SSPPU price, this is him saying the price of

11:05:59 1 the SSPPU is this amount. That is directly -- that --
11:06:06 2 that's from that document. He is saying the price of the
11:06:10 3 SSPPU in this case is that amount. He should not be
11:06:13 4 permitted -- well, he shouldn't be permitted to do so
11:06:17 5 unless there is a basis to say that that is, in fact, the
11:06:20 6 price of the SSPPU.

11:06:21 7 And that brings us to the real flaw in this
11:06:28 8 analysis. At Docket 164, at Page 12 of 13, in Samsung's
11:06:38 9 briefing, they state: Mr. Martinez does not refer to the
11:06:42 10 prices of ITO sensors to calculate his proposed royalties
11:06:46 11 for the Atmel patent and does not draw any equivalency
11:06:51 12 between the ITO sensors and the SSPPU for the Atmel patent.
11:06:54 13 They're admitting that he is not saying that these are
11:06:58 14 comparable prices, yet he's using the price from a
11:07:01 15 non-comparable, non-accused product to say that's the price
11:07:04 16 of the SSPPU.

11:07:04 17 He can disagree about what the SSPPU is, but he
11:07:07 18 has to establish that that number is relevant before he
11:07:09 19 bases his opinion on it. And he doesn't do so. Again,
11:07:13 20 there's no dispute that these are non-accused comp --
11:07:16 21 components from non-accused products.

11:07:19 22 Mr. Martinez does not dispute that -- well, they
11:07:25 23 admit that these are -- that he's not even saying that
11:07:27 24 these are comparable to the components in the accused
11:07:30 25 products that they say are the SSPPU. And Mr. Martinez

11:07:34 1 admitted in deposition that he doesn't know if these prices
11:07:38 2 on these very selectively-produced numbers are even
11:07:41 3 representative of the components he's looking at. They're
11:07:44 4 just a few selected screenshots of components of a
11:07:50 5 non-accused product, which, of course, is the other problem
11:07:52 6 with the document itself.

11:07:53 7 The document is -- purports to be a screenshot.
11:07:57 8 They took -- I think it is important that they took
11:08:00 9 screenshots from a database. They could have done a report
11:08:06 10 from the database. Any database you do a query.
11:08:08 11 Presumably did a query. They could have produced a
11:08:09 12 document from the database. They could have produced the
11:08:11 13 purchase orders underlying that document.

11:08:13 14 They didn't do any of that. They took a
11:08:15 15 screenshot so you can't see what's included and what's not.
11:08:19 16 So you don't know what the query was. And they put that
11:08:23 17 into an Excel document with columns and lines to make it
11:08:25 18 look like it was a spreadsheet. And they keep referring to
11:08:26 19 it as a spreadsheet. I mean, it's just not a spreadsheet.
11:08:30 20 A spread -- just because you stick something -- a
11:08:32 21 screenshot into an Excel document doesn't make it a
11:08:39 22 spreadsheet.

11:08:39 23 And we would argue it's prejudicial to tell the --
11:08:40 24 to say to the jury you have a spreadsheet when you've taken
11:08:41 25 a screenshot from a database. And they didn't produce any

11:08:44 1 of the underlying evidence.

11:08:49 2 So it's an improper analysis. It's based on
11:08:52 3 improper evidence. But even if the document was not in
11:08:56 4 itself clearly not created in the course of a normal
11:08:59 5 business, clearly created for this litigation, we have no
11:09:03 6 idea how they even selected which of these to show. He
11:09:06 7 admits they don't know -- he doesn't know if they're
11:09:10 8 representative or not.

11:09:11 9 The mere fact that he says that they're not
11:09:13 10 comparable to the components he says are the SSPPU means
11:09:17 11 they're just -- it's improper to show those to -- to say to
11:09:20 12 the jury, this is what you should be looking at for the
11:09:23 13 price of the SSPPU.

11:09:23 14 In terms of the issue of timing, that's really
11:09:28 15 sort of a subissue. I'd just point out that they sort of
11:09:31 16 invented this story about why they produced this so late.
11:09:35 17 They say that, oh, in passing, you -- you referred to the
11:09:37 18 SSPPU as being the accused product, so that's why somehow
11:09:40 19 we came up with this document.

11:09:42 20 I don't really understand that argument. What I
11:09:45 21 do understand is that in our opening brief, we pointed out
11:09:48 22 that the metadata on this document shows that it was
11:09:51 23 created on May 19th, 2020. If they had produced it at that
11:09:59 24 time, we would have had it in time to talk to the witnesses
11:10:01 25 designated on the relevant topics about it. Instead, they

11:10:02 1 didn't produce it until after those depositions.

11:10:09 2 Finally, just quickly on the display panel issue,

11:10:15 3 separately for the '450 and '338 patents, they want to

11:10:19 4 argue that the SSPPU is not the display module, but it's a

11:10:21 5 subpart of the display panel. They say that the evidence

11:10:24 6 for that is that SEI provides that panel to some

11:10:24 7 subsidiaries.

11:10:32 8 They -- that's an entirely -- there's no evidence

11:10:32 9 in this case at all that supports that. It's entirely

11:10:35 10 based in a conversation -- a hearsay conversation with a --

11:10:40 11 with a -- with a fact employee -- an employee of Samsung.

11:10:46 12 And the problem with that is that we had a

11:10:49 13 specific interrogatory. It's Exhibit K to our motion,

11:10:52 14 Rog -- Rog 10, asking for any sales -- any sales of any

11:10:58 15 product containing OLED technologies. If they are now in

11:11:01 16 their rebuttal report suddenly going to say, oh, the SSPPU,

11:11:05 17 the real product -- the real component at issue is this

11:11:09 18 thing, and it's sold because we give it to a subsidiary

11:11:12 19 that puts together the module, then it was incumbent on

11:11:18 20 them to actually provide any indication of that during

11:11:23 21 discovery, and in particular to answer that rog.

11:11:25 22 Instead in that rog -- in response to that rog,

11:11:29 23 they gave a 33(d) response that identified sales

11:11:31 24 information about the display module because that's really

11:11:36 25 what was at issue up until the rebuttal report. And they

11:11:40 1 still haven't produced any evidence about this so-called
11:11:44 2 sale. And they still haven't produced any evidence about
11:11:46 3 what the -- what the costs were or the dollars or what the
11:11:50 4 sale price was. So they're just putting out that there's
11:11:54 5 an SSPPU that we've suddenly identified in a rebuttal
11:11:57 6 report. And they say, well, we don't have to produce any
11:12:00 7 sales information because -- because it was essentially a
11:12:05 8 sister company or it wasn't really an arm's length
11:12:08 9 transaction, the sales price doesn't matter.

11:12:10 10 Well, they don't get to make that choice. They
11:12:12 11 don't get to say, hey, this is the SSPPU. You don't need
11:12:16 12 to know what the sales price is. We're just not going to
11:12:18 13 produce it.

11:12:19 14 They didn't produce any information during
11:12:21 15 discovery. We asked for that information. They didn't
11:12:24 16 produce it. So that should be excluded on that basis. And
11:12:28 17 beyond, it's just not a reliable basis to have a couple of
11:12:32 18 sentences in a conversation to say, hey, you know, we sell
11:12:35 19 this -- this -- a hearsay conversation. By the way, we --
11:12:39 20 we provide the components -- the people who put together
11:12:42 21 the display module, we provide them with the components,
11:12:46 22 and, therefore, that should be the basis of your opinion
11:12:49 23 that that's a salable SSPPU.

11:12:50 24 They're going to say that, well, Mr. Fontecchio
11:12:50 25 has his own opinion that the display panel is the SSPPU,

11:12:56 1 and we don't -- we're not moving to -- to exclude
11:12:57 2 Dr. Fontecchio's opinion that he thinks technically a
11:13:00 3 display panel rather than a display module is the SSPPU.
11:13:04 4 But the opinion that the display panel is actually
11:13:07 5 salable and is actually sold, that is in Mr. Martinez's
11:13:10 6 opinion, and that should be excluded because it was not
11:13:12 7 disclosed during discovery, and it has no basis in any
11:13:16 8 evidence.

11:13:17 9 THE COURT: What else, counsel?

11:13:22 10 MR. HOFFMAN: That's it, Your Honor.

11:13:24 11 THE COURT: Let me hear a response from
11:13:26 12 Defendants.

11:13:34 13 MR. LERNER: Your Honor, Jeff Lerner on behalf of
11:13:36 14 Defendants.

11:13:36 15 THE COURT: Please proceed.

11:13:38 16 MR. LERNER: Thank you, Your Honor.

11:13:39 17 To start with the settlements, Dr. Sierros, a
11:13:41 18 technical expert, considered the patents at issue in each
11:13:44 19 of the agreements and offered opinions that they're
11:13:46 20 technically comparable to the '311 patent. He reviewed
11:13:50 21 every patent. He looked at the commercial products that
11:13:53 22 were at issue in the cases.

11:13:55 23 Solas hasn't challenged Dr. Sierros's technical
11:13:59 24 comparability opinions. Mr. Martinez considered the
11:14:03 25 technical comparability explained by Dr. Sierros and the

11:14:06 1 relevant circumstances surrounding each of the agreements
11:14:08 2 to evaluate economic comparability. He considered that
11:14:11 3 they were in the context of litigation. He considered who
11:14:17 4 the parties were. Each of these involved Samsung
11:14:21 5 Electronics or Samsung Electronics America. He considered
11:14:21 6 the circumstances of the negotiation.

11:14:24 7 He points out that the agreements were all for
11:14:26 8 lump-sum royalty structures, which is consistent with how
11:14:32 9 Samsung Display would -- or Samsung Electronics would
11:14:32 10 negotiate a hypothetical royalty.

11:14:36 11 And the mere fact these were entered into in
11:14:39 12 connection with settlement doesn't make them
11:14:41 13 non-comparable. Solas hasn't identified any specific
11:14:44 14 aspect of the litigation or agreements that would make them
11:14:47 15 non-comparable.

11:14:49 16 Mr. Martinez offers the opinion they are
11:14:51 17 comparable, and his opinions on this issue are reliable,
11:14:54 18 they're well-founded, they're based on unchallenged
11:14:59 19 technical opinions. And if they want to challenge the
11:15:01 20 weight to be given to these, they can do that. But there's
11:15:04 21 nothing unreliable about these opinions.

11:15:06 22 And as far as the non-comparable agreements,
11:15:11 23 Mr. Martinez uses those simply to point out a practice of
11:15:17 24 the Defendants to negotiate lump-sum, rather than running
11:15:20 25 royalty agreements.

11:15:21 1 I don't believe there's any intention to put the
11:15:23 2 numbers in those agreements before the jury. It's simply
11:15:26 3 to show additional evidence of the practice of the
11:15:31 4 Defendants in terms of how they negotiate royalty
11:15:35 5 arrangements and the preference for lump-sum -- lump-sum
11:15:37 6 structures.

11:15:38 7 To turn to the smallest salable patent practicing
11:15:44 8 unit, again, this concerns the '311 patent. Dr. Sierros
11:15:48 9 offers a technical opinion that the smallest salable patent
11:15:53 10 practicing unit is the touch sensor. Again, that opinion
11:15:55 11 is not challenged by Solas.

11:15:57 12 Mr. Martinez looked for information to value a
11:16:05 13 touch sensor. And to step back and give some of the
11:16:08 14 history here, I mentioned yesterday, Solas had accused a
11:16:14 15 large number of products of infringing the '311. Their
11:16:16 16 contentions changed at various times. Until May 17, 2019,
11:16:21 17 they were accusing products that contained a touch sensor
11:16:24 18 made out of material called ITO.

11:16:27 19 And so when they tell you now ITO is unsuitable,
11:16:31 20 throughout the litigation until two weeks before it end --
11:16:34 21 the discovery period ended, they were accusing products
11:16:37 22 with that ITO material of infringing.

11:16:40 23 And when we looked into this, and certainly when
11:16:43 24 we asked for their position on what is the smallest salable
11:16:48 25 patent practicing unit and they came back and said it's a

11:16:51 1 smartphone, we looked into what information we could come
11:16:53 2 up with to show what's the value of a touch sensor, Samsung
11:16:59 3 Display purchased those ITO touch sensors from a vendor.

11:17:03 4 And this gets into the document issue.

11:17:05 5 As I understand it, there's a database within
11:17:09 6 Samsung Display where they have vendor invoices. They're
11:17:12 7 not separate documents. They can't be printed out
11:17:14 8 individually.

11:17:15 9 It's not a database we understand that can be
11:17:18 10 queried in the way a sales database might be. We worked
11:17:24 11 carefully and closely with the client to figure out how can
11:17:24 12 we get this information. And it was determined the way to
11:17:27 13 get it would be to take screen captures of the information
11:17:31 14 from that display to provide it, because we can't
11:17:34 15 provide -- we can't produce a database.

11:17:36 16 We've provided that information, and counsel
11:17:39 17 points out that the metadata shows it was created on May
11:17:43 18 19th, and we got it to them eight days later.

11:17:46 19 But all before that, there was intense
11:17:49 20 investigation to understand what information the client
11:17:52 21 has, how to access it, what can we -- what form it can be
11:17:56 22 put in. This is all during a period that's not only
11:18:01 23 intensely busy in this case, but we and our client are
11:18:02 24 dealing with COVID issues that have people out of their
11:18:05 25 offices and are hampering coordination.

11:18:10 1 We worked closely with the client to get the
11:18:14 2 information in the discovery period to provide it. And
11:18:15 3 what that information shows is commercial value of touch
11:18:18 4 sensors. And Mr. Martinez doesn't use it to say this is
11:18:21 5 the value of the touch sensor specifically in the accused
11:18:25 6 products, but it's proxy.

11:18:28 7 Under LaserDynamics, you look at proxies, you look
11:18:33 8 at industry standards information, and that provides a way
11:18:36 9 to value the smallest salable patent practicing unit,
11:18:40 10 which, again, our expert here says is the touch sensor, not
11:18:44 11 the display module.

11:18:44 12 This was provided in fact discovery. Solas didn't
11:18:48 13 raise any questions about the document in fact discovery.
11:18:52 14 They didn't reach out to us. They didn't -- this wasn't
11:18:57 15 something they even requested. This is something that in
11:19:01 16 thinking about the issues we determined ought to be
11:19:04 17 provided.

11:19:04 18 And what they're seeking now is a sanction to
11:19:06 19 exclude it, a document produced in fact discovery. It was
11:19:10 20 even produced before the deposition as a corporate
11:19:10 21 representative on the collection and production of
11:19:16 22 documents. It's a witness who they asked about purchases
11:19:17 23 of certain materials.

11:19:18 24 It's important evidence to Mr. Martinez's
11:19:23 25 opinions, and it's also worth pointing out that they had an

11:19:28 1 opportunity to address it in their expert reports.

11:19:31 2 Mr. Dell had a supplemental report on June 3rd, which they

11:19:34 3 asked for to address certain documents. We agreed. They

11:19:37 4 didn't ask for any further reports on this.

11:19:41 5 So this is a document that was provided to -- to

11:19:48 6 prepare -- to provide information that's more relevant to

11:19:52 7 the smallest salable patent practicing unit. It's reliable

11:19:56 8 information from the company.

11:19:58 9 Mr. Martinez discussed it with Mr. Kim, the

11:20:01 10 witness who was also available for deposition.

11:20:05 11 But more to the point, there was never any

11:20:08 12 question raised. We would have been able to address those

11:20:12 13 questions. We would have hoped to work cooperatively to

11:20:15 14 raise -- to address any questions about the contents of a

11:20:17 15 document.

11:20:17 16 So we believe that Mr. Martinez should be

11:20:20 17 permitted to rely on documents produced in discovery to

11:20:23 18 support his opinion. Again, if they have questions about

11:20:26 19 is the pricing right, is it representative, they can ask

11:20:29 20 that on cross-examination, but it doesn't get to the

11:20:33 21 reliability of the opinions or the analysis.

11:20:37 22 On the final point about the '450 and '338s,

11:20:43 23 Dr. Fontecchio offered a technical opinion that the

11:20:47 24 smallest salable patent practicing unit is the panel, not

11:20:49 25 the module. The difference is the module adds polarizing

11:20:54 1 films, touch sensors, glass, things that are not related to
11:21:01 2 the claims of the '450 and the '338.

11:21:02 3 Solas doesn't identify anything extra in the
11:21:05 4 module that relates to the claims. And SDC, in fact, sells
11:21:11 5 OLED panels to subsidiaries which Mr. Martinez understood
11:21:15 6 and confirmed in a discussion with Mr. Kim.

11:21:18 7 But Dr. Fontecchio's opinions about smallest
11:21:21 8 salable patent practicing unit which aren't challenged
11:21:22 9 would support Mr. Martinez's opinions regardless. And it
11:21:25 10 bears note that for other displays, like LCDs, display
11:21:31 11 panels are sold commercially -- widely on the market, as
11:21:36 12 Mr. Credelle, Solas's expert, admits.

11:21:40 13 So the issue here is Mr. Martinez recently points
11:21:40 14 out that the difference in value is something that's
11:21:43 15 relevant to an apportionment analysis for the '450 and
11:21:47 16 '338. And, again, if Solas disagrees with that, that's
11:21:51 17 something they can cross-examine him on.

11:21:53 18 But there's no unreliability, particularly when
11:21:56 19 they're not moving to exclude Dr. Fontecchio from
11:22:01 20 testifying that smallest salable patent practicing unit is
11:22:02 21 the display panel.

11:22:05 22 Unless Your Honor has any questions, I have
11:22:10 23 nothing further.

11:22:10 24 THE COURT: No. Thank you, counsel.

11:22:11 25 All right. With regard to this motion, I'm going

11:22:39 1 to grant the motion with regard to Mr. Martinez's opinions
11:22:44 2 that rely on this Excel spreadsheet, which I think has been
11:22:49 3 identified as DC -- excuse me, SDC0332534. The underlying
11:23:00 4 data is suspiciously absent, and the factual basis for his
11:23:07 5 opinions are unreliable, in the Court's view. And this, in
11:23:09 6 my view, crosses the Daubert threshold as unreliable.

11:23:12 7 And to give application to that partial grant, I'm
11:23:19 8 going to strike Paragraph 198 from Mr. Martinez's opinions
11:23:25 9 and Schedule 11 to his report.

11:23:28 10 Now, in all other respects, the motion is going to
11:23:34 11 be denied. And with regard to the comparability issues,
11:23:41 12 the settlements, the other matters that were argued over,
11:23:45 13 none of those, in the Court's view, cross the Daubert
11:23:49 14 threshold of being unreliable.

11:23:54 15 And so except as to the Excel spreadsheet issue,
11:24:01 16 all the other grounds and bases urged by Plaintiff in their
11:24:05 17 motion are denied.

11:24:08 18 Now, I also want to turn at this juncture to two
11:24:15 19 dispositive motions that the parties yesterday represented
11:24:20 20 to the Court that they were both in agreement that should
11:24:24 21 be decided and acted on based on the briefing and the
11:24:29 22 papers and that there was not a pressing need for oral
11:24:31 23 argument for the parties on those two motions.

11:24:33 24 Those include Defendants' motion for summary
11:24:39 25 judgment of no willfulness, Document 141; and Plaintiff's

11:24:46 1 motion to strike the expert opinions concerning
11:24:54 2 non-infringing alternatives, Document 135.

11:24:56 3 With regard to Document 141 and Defendants' motion
11:24:56 4 for summary judgment of no willfulness, the Court's
11:25:07 5 persuaded, having reviewed the briefing in its entirety and
11:25:10 6 all matters on file, that there are genuine issues of
11:25:17 7 material fact that preclude the Court granting that motion,
11:25:21 8 and the Court denies the Defendants' motion for summary
11:25:24 9 judgment of no willfulness.

11:25:26 10 With regard to Document 135, Plaintiff's motion to
11:25:30 11 strike expert opinions concerning non-infringing
11:25:33 12 alternatives, the Court's considered the entirety of the
11:25:38 13 briefing between the parties on this, as well, and the
11:25:41 14 Court concludes that there are no challenges as to those
11:25:51 15 opinions that rise to an adequate level that would support
11:25:56 16 their actually being struck, that those can adequately be
11:26:00 17 addressed through vigorous cross-examination. And I'm
11:26:03 18 going to deny the Plaintiff's motion to strike expert
11:26:06 19 opinions concerning non-infringing alternative --
11:26:10 20 alternatives, Document 135.

11:26:12 21 Now, unless I have missed something, that gives
11:26:19 22 the parties guidance from the Court on all the dispositive
11:26:22 23 motions that have been presented as a part of this
11:26:25 24 pre-trial. And that would bring us to the next -- that
11:26:29 25 would bring us next to the issue of motions in limine.

11:26:33 1 It's 11:30, according to the clock here on the
11:26:36 2 bench. We're going to break at this point. And I want you
11:26:43 3 back at 12:30. We're going to break for an hour. Over
11:26:47 4 that period of time, if you have time for lunch, that's
11:26:50 5 fine. But the main emphasis I want you to pursue is a
11:26:54 6 discussion by way of meet and confer efforts between both
11:26:58 7 sides regarding outstanding motions in limine.

11:27:02 8 And in light of the guidance that you've received
11:27:06 9 concerning and flowing from these dispositive motions, I'd
11:27:09 10 like a report when we reconvene as to which previously
11:27:13 11 disputed motions in limine have now been able to be
11:27:15 12 resolved. In light of that guidance, there should be
11:27:17 13 significant narrowing of the disputed motions in limine.

11:27:22 14 All right. With that, we stand in recess until
11:27:24 15 12:30.

11:27:26 16 COURT SECURITY OFFICER: All rise.

12:41:26 17 (Recess.)

12:41:27 18 COURT SECURITY OFFICER: All rise.

12:41:28 19 THE COURT: Be seated, please.

12:41:48 20 Counsel, my understanding is that there's been a
12:41:58 21 material narrowing of the disputed motions in limine.
12:42:06 22 Before we get to those, there apparently are certain agreed
12:42:12 23 motions in limine as reflected on Document 225.

12:42:19 24 Can I get a recognition on the record from both
12:42:22 25 sides that the limine matters set forth in Document 225

12:42:28 1 are, in fact, agreed to by both Plaintiff and Defendant?

12:42:32 2 MR. HASLAM: Yes, on behalf of Defendants.

12:42:34 3 MS. HENRY: Yes, Your Honor.

12:42:34 4 THE COURT: Okay. Also, I understand certain

12:42:39 5 counsel on Plaintiff's side have an early to mid-afternoon

12:42:44 6 flight to catch; is that correct?

12:42:46 7 MR. MIRZAIE: That's correct, Your Honor. Marc

12:42:49 8 Fenster and I do, so...

12:42:49 9 THE COURT: As long as the issues still before the

12:42:53 10 Court are adequately covered by your co-counsel, that's not

12:42:57 11 a problem.

12:42:57 12 MR. MIRZAIE: More than adequately covered.

12:42:59 13 THE COURT: All right. Counsel, I don't have a

12:43:06 14 composite listing of what you've narrowed. And I

12:43:11 15 understand some of your agreements may vary from the

12:43:14 16 original suggested motion in limine.

12:43:17 17 So the only way I know to make sure we don't

12:43:21 18 overlook anything is to start at the top and work our way

12:43:24 19 down. And if along the way we come to a matter that's

12:43:27 20 agreed to, then I'll get a short recital in the record, and

12:43:30 21 we'll move on.

12:43:31 22 So following that approach, let's begin with the

12:43:35 23 proposed motions in limine from the Plaintiff, Solas. And

12:43:40 24 we'll start with Plaintiff's MIL No. 1, excluding evidence

12:43:46 25 of no longer asserted claims, products, or non-asserted

12:43:50 1 infringement theories. Do we have a dispute here, or do we
12:43:54 2 have an agreement?

12:43:55 3 MR. MIRZAIE: We have a substantial narrowing, but
12:43:57 4 we still have a dispute here, Your Honor.

12:43:59 5 THE COURT: All right. Go to the podium and tell
12:44:00 6 me what the issue is, then.

12:44:02 7 MR. MIRZAIE: Thank you, Your Honor.

12:44:03 8 So Solas MIL No. 1 is to exclude evidence of no
12:44:07 9 longer asserted infringement theories, no longer
12:44:11 10 asserted -- no longer accused products, and no longer
12:44:18 11 asserted claims.

12:44:18 12 What we have agreement on, I believe, and -- and
12:44:21 13 my colleagues on the other side can correct me if this is
12:44:25 14 wrong, but on the first item of no non-asserted
12:44:29 15 infringement theories, I believe we have agreement. No
12:44:32 16 one's going to mention any -- I don't believe there really
12:44:35 17 were any to -- to begin with possibly.

12:44:38 18 On the second piece, no longer accused products,
12:44:41 19 we discussed this issue with Samsung during the break.

12:44:47 20 Solas agrees that we'll drop the argument as to
12:44:53 21 non-infringing alternatives identified in an expert report.

12:44:59 22 But Samsung doesn't want to stop there. They want
12:45:04 23 to go beyond what's in the expert reports and talk about
12:45:08 24 other dropped products because they claim it is relevant to
12:45:14 25 willfulness.

12:45:16 1 And the argument they made during the break is
12:45:18 2 that no longer accused products and Samsung's continued
12:45:23 3 sale of them is relevant to -- to willfulness because it
12:45:27 4 tends to show no willfulness. So it's relevant to our
12:45:31 5 willfulness case.

12:45:32 6 Now, that's incorrect. Our willfulness case is
12:45:34 7 not based on selling unaccused products. Our willfulness
12:45:38 8 case in part is based on selling accused products only.
12:45:44 9 And there's no law that suggests that the sale of not
12:45:48 10 accused products is -- tends to show no willfulness either.
12:45:52 11 So we don't think that going --

12:45:54 12 THE COURT: What about the sale of products that
12:45:56 13 are accused and then somewhere in the process along the
12:45:59 14 way, they're dropped and they're no longer accused? How
12:46:03 15 does the sale of those products impact willfulness?

12:46:07 16 MR. MIRZAIE: We don't believe it does, Your
12:46:09 17 Honor. And I think that's going to likely be the remaining
12:46:13 18 dispute on no longer accused products. We don't believe it
12:46:14 19 does. Our willfulness case is not based on those. We've
12:46:17 20 dropped those products, and there's no law to suggest that
12:46:19 21 continued sales of unaccused or no longer accused products
12:46:23 22 shows no willfulness.

12:46:24 23 So we don't believe it's relevant. Furthermore,
12:46:26 24 going beyond the expert reports to suggest that it is
12:46:29 25 relevant, even if it were, the -- any probative value would

12:46:35 1 be far outweighed by the prejudice of telling the jury that
12:46:38 2 this product was accused in this litigation, and they're no
12:46:42 3 longer accusing it.

12:46:43 4 With the non-infringing alternative, I believe we
12:46:46 5 have agreement with the other side that the experts just
12:46:49 6 refer to that as a non-infringing alternative. The jury
12:46:52 7 doesn't have to know that it was accused at one point in
12:46:54 8 this litigation before trial and later it became unaccused
12:46:59 9 in the narrowing.

12:46:59 10 With this additional piece that there's a dispute
12:47:04 11 on, I believe that Samsung -- that the only way that they
12:47:07 12 can frame it, and they have suggested they're going to
12:47:10 13 frame it this way to the jury, is that these products were
12:47:13 14 accused, they're no longer accused. That's a reason why we
12:47:16 15 can't be found willful.

12:47:17 16 And that whole issue is -- it's irrelevant to
12:47:20 17 willfulness, and it actually requires both going beyond the
12:47:23 18 scope of the reports, and it -- and it requires telling the
12:47:26 19 jury that a product used to be accused before we got to
12:47:33 20 trial in this litigation process. And that's something
12:47:35 21 that -- that non-infringing alternatives doesn't have.

12:47:37 22 And that kind of thing is -- we believe that the
12:47:40 23 Imperium case is squarely on point here, Your Honor.
12:47:44 24 There, the Court held that no longer accused products,
12:47:47 25 products that were dropped from the litigation, are

12:47:49 1 irrelevant, and they were excluded.

12:47:52 2 So we think as to that remaining dispute on
12:47:55 3 accused products, our -- our MIL should be entered. We're
12:48:01 4 fine with Samsung referring to those same products as,
12:48:07 5 quote, non-infringing alternatives and sticking to the
12:48:08 6 scope of their expert's reports in doing so.

12:48:11 7 THE COURT: All right. Let me hear from
12:48:12 8 Defendants.

12:48:13 9 MR. MIRZAIE: And there's -- just one more issue
12:48:15 10 in our motion in limine, if I may, Your Honor.

12:48:18 11 THE COURT: All right. Be brief.

12:48:20 12 MR. MIRZAIE: Yeah, it's -- it's no longer
12:48:22 13 asserted claims. So as you noticed yesterday, we have
12:48:27 14 dropped claims, narrowed the -- the claim set
12:48:30 15 substantially. We've talked to opposing counsel about
12:48:33 16 narrowing it further.

12:48:35 17 And Samsung has mentioned that, for example, with
12:48:38 18 regard to dropped Claim 1, Independent Claim 1, on the '450
12:48:42 19 patent, they still intend to tell the jury that -- talk
12:48:49 20 about that claim, even though it's dropped, and it's no
12:48:51 21 longer asserted. There's no case or controversy on it.
12:48:55 22 They want to talk about that claim and show the jury Claim
12:48:58 23 1 and let it -- you know, let the jury know that Claim 1 --
12:49:03 24 our expert has no dispute over.

12:49:05 25 Rather than what we offered to them, which is the

12:49:07 1 elements of Claim 1 get worked into the claims that we are
12:49:11 2 asserting before the jury, 4 and 5. They're all elements
12:49:13 3 of 4 and 5 under the law, obviously.

12:49:16 4 And they're -- they're free to let the jury know
12:49:19 5 that our expert doesn't have any dispute on those elements
12:49:21 6 of Claim 4 or 5. They want to go a step further and show
12:49:25 7 the jury Claim 1, separate from 5, and we think that's
12:49:28 8 wholly unnecessary, and it could create prejudice, as you
12:49:33 9 suggested yesterday.

12:49:33 10 THE COURT: All right. Let me hear from Samsung.
12:49:37 11 MR. LERNER: Thank you, Your Honor. Jeff Lerner
12:49:42 12 for Defendants.

12:49:43 13 THE COURT: Tell me how dropped claims could
12:49:47 14 impact the issue of willful infringement.

12:49:49 15 MR. LERNER: Your Honor's question was directly on
12:49:55 16 point. And this is specifically for post-filing
12:49:58 17 willfulness. The theory for post-filing willfulness is our
12:50:02 18 complaint -- our accusations ought to have led you to stop
12:50:06 19 what you were doing.

12:50:07 20 And we think it's relevant that those accusations
12:50:09 21 were for a wide set of products. We had a good faith basis
12:50:09 22 to believe they weren't infringing or infringing of our
12:50:14 23 claims. We continued. And over the course of the case, it
12:50:17 24 was recognized that many of those products were not
12:50:20 25 infringing. And for each of these we're talking about, we

12:50:23 1 have non-infringement opinions by our expert. This
12:50:26 2 actually overlaps, I think, fully with the non-infringing
12:50:29 3 alternatives.

12:50:29 4 So I think it's at -- at the very least,
12:50:32 5 circumstantial evidence to our good faith basis to proceed
12:50:36 6 with sales of the accused products that the mere accusation
12:50:39 7 of those products was not a reason we should have stopped
12:50:43 8 our commercial activity.

12:50:44 9 And we think that's a very important context to
12:50:46 10 give to the jury if the Plaintiff is allowed to argue that
12:50:49 11 the filing of the complaint or the service of contentions
12:50:52 12 should have arrested that activity that we've been engaging
12:51:05 13 in for years.

12:51:06 14 THE COURT: All right. Well, I'm going to grant
12:51:09 15 Plaintiff's Motion in Limine No. 1, and I'm going to, by
12:51:12 16 way of limine order, without prior leave of the Court,
12:51:17 17 exclude evidence of no longer asserted claims, products, or
12:51:21 18 infringement theories.

12:51:23 19 Now, to the extent there's a no longer asserted
12:51:32 20 product that forms the basis for a non-infringing
12:51:35 21 alternative, this ruling doesn't preclude the Defendant
12:51:38 22 from presenting that non-infringing alternative.

12:51:39 23 It does preclude the Defendant from characterizing
12:51:42 24 that non-infringing alternative as a previously asserted
12:51:48 25 and now dropped product in the case. There's nothing

12:51:51 1 probative about whether it is or isn't a non-infringing
12:51:54 2 alternative, that it may have been previously accused and
12:51:57 3 is no longer accused in the case.

12:51:59 4 With regard to the willfulness issue, I'm going to
12:52:07 5 exercise my gatekeeping authority, and that is the
12:52:11 6 assertion of prior claims or products that have been
12:52:18 7 asserted and are now dropped. I'm going to require prior
12:52:22 8 leave of Court before that's raised with the jury.

12:52:26 9 Quite honestly and candidly, Mr. Lerner, one of
12:52:29 10 the challenges this Court has is getting Plaintiffs to
12:52:34 11 narrow their claims. If every Plaintiff knows going
12:52:37 12 forward that when they narrow their claims and drop them
12:52:40 13 those are going to be used as a defensive sword against
12:52:43 14 their willfulness claim, it's going to make it harder for
12:52:47 15 any Plaintiff to be convinced to narrow their claims.

12:52:50 16 Now, that's -- that doesn't go to the heart of the
12:52:53 17 substantive issue, but it is a very real practical
12:52:56 18 consideration.

12:52:57 19 Now, there may be a context as we go through the
12:52:59 20 trial where with a request for leave, I will see a way for
12:53:06 21 you to raise what you're wanting to raise in a way that I
12:53:08 22 believe is acceptably prejudicial to the Plaintiff. But
12:53:13 23 without knowing the exact context in real-time, I'm not
12:53:16 24 prepared to give you unfettered access to asserting before
12:53:21 25 the jury that a certain claim was previously alleged by

12:53:25 1 Plaintiff and has now been dropped.

12:53:27 2 So I hope that's clear. If you have any question
12:53:29 3 about the scope of my ruling, now is the time for you to
12:53:32 4 raise it with me.

12:53:32 5 MR. LERNER: I do. And if Your Honor permits me,
12:53:34 6 I didn't address the no longer asserted claims. There's a
12:53:39 7 very specific issue we have in mind for this.

12:53:41 8 Mr. Dell, their damages expert, in his -- in his
12:53:44 9 damages analysis -- this is Paragraphs 177 to 178 for the
12:53:50 10 '450 patent, 179 to 181 for the '338 patent. He -- he says
12:53:59 11 the asserted Independent Claim 1 reads as follows, and then
12:54:03 12 he proceed -- he continues. He doesn't mention any other
12:54:08 13 claims in his report.

12:54:09 14 And we believe it's a fair set of questions to ask
12:54:13 15 him -- not to say Claim 1 was dropped, but to point to --
12:54:16 16 to examine him that when he was attributing value to the
12:54:19 17 '450 patent, it was on the basis of Claim 1 and that he
12:54:23 18 understands Claim 4 and Claim 5 have additional elements
12:54:27 19 that are narrow -- have been narrowed.

12:54:29 20 It's a construct of the way the report was written
12:54:31 21 that he's addressed claims that are no longer in the case,
12:54:35 22 and we can't rewrite history there.

12:54:37 23 THE COURT: Well, as I told you, I'm going to need
12:54:39 24 the context of this developing in real-time during the
12:54:42 25 course of the trial. What you're trying to do is you're

12:54:46 1 trying to give me what you think is going to happen and ask
12:54:48 2 me to rule on it in advance, and I'm not going to do that.

12:54:51 3 I'm going to preserve my gatekeeping role until
12:54:55 4 the time that you believe it's appropriate to seek leave of
12:55:00 5 the Court, and I will have had the development of the case
12:55:03 6 up until that point before me. I'm not going to do it in
12:55:06 7 isolation now.

12:55:07 8 So I'm -- I'm excluding, in effect, all of what's
12:55:11 9 asked for under MIL -- Plaintiff's MIL No. 1, except prior
12:55:17 10 products that now would form the basis of an alleged
12:55:21 11 non-infringing alternative as long as they're not
12:55:23 12 identified as previously accused products. And beyond
12:55:28 13 that, leaving open the possibility of the Court granting
12:55:35 14 leave, you're going to need to seek and obtain leave in
12:55:37 15 advance, okay?

12:55:38 16 MR. LERNER: I understand, Your Honor.

12:55:39 17 THE COURT: All right. Let's go, then, to MIL No.
12:55:44 18 2, Plaintiff's MIL No. 2.

12:55:49 19 What's the status of this, counsel?

12:55:51 20 MR. HASLAM: I think there are some agreements,
12:55:53 21 but there may be still some disputes.

12:55:55 22 This is on background prior art. As is typical,
12:55:57 23 our expert talks about what the people of ordinary skill in
12:56:01 24 the art would have known. He uses various text, treatises,
12:56:06 25 and patents.

12:56:07 1 We've agreed that those can be used and shown to
12:56:09 2 the jury, but they will not go back to the jury when they
12:56:13 3 deliberate.

12:56:14 4 THE COURT: Wait -- wait a minute, Mr. Haslam.

12:56:19 5 I'm -- I'm going to clearly segregate any disputes
12:56:22 6 regarding potential exhibits in the case from the motion in
12:56:26 7 limine practice.

12:56:27 8 MR. HASLAM: Okay.

12:56:27 9 THE COURT: I often get motions in limine that are
12:56:30 10 an attack on documents and potential exhibits. If this is
12:56:33 11 one of those, we'll take it up when we get to exhibit
12:56:36 12 disputes.

12:56:36 13 MR. HASLAM: Well, this was -- that was -- I
12:56:41 14 understand what the Court's saying.

12:56:42 15 THE COURT: I'm asking for clarification.

12:56:43 16 MR. HASLAM: Yeah. That was something we had
12:56:44 17 agreed to as part of this.

12:56:45 18 But I think the issue is, is that our expert will
12:56:49 19 testify about what people of ordinary skill in the art knew
12:56:52 20 about various things. My understanding is the dispute
12:56:57 21 is -- and we will not in that -- in that context map a
12:57:02 22 particular piece of background art to a specific claim
12:57:05 23 limitation. So we've agreed on that.

12:57:07 24 I think the concern is -- and -- as -- as
12:57:12 25 discussed over the lunchtime break, they don't want us, in

12:57:17 1 some fashion, I think, to talk about something that may be
12:57:21 2 a claim limitation. The example I gave is the PET is -- is
12:57:25 3 a flexible substrate that is used -- is referred to as one
12:57:29 4 of the substrates in the '311 patent.

12:57:32 5 And our expert is going to say that PET was known
12:57:35 6 as a flexible substrate long before the '311 patent came
12:57:39 7 along. So people knew about that.

12:57:40 8 And my understanding is that that is the touch
12:57:43 9 point of where there may be some concern that he can't say
12:57:46 10 what was in the background prior -- the displays were in
12:57:51 11 the background prior art. PET, the flexible -- flexible
12:57:54 12 substrates were well-known. PET, which is mentioned in the
12:57:58 13 patent, was well-known as a flexible substrate.

12:58:02 14 I mean, the way -- the way PET comes up to you
12:58:04 15 it's all rolled up in a little -- maybe a six inch or
12:58:11 16 diameter or radius ball. You know -- you can just tell
12:58:12 17 from looking at it that it's flexible.

12:58:14 18 THE COURT: Well, let me say this. If -- if
12:58:16 19 you're going to offer for admission as a pre-admitted
12:58:18 20 exhibit prior art that doesn't form the basis of your
12:58:22 21 invalidity contentions, then it's not likely I'm going to
12:58:25 22 admit non-asserted prior art as an exhibit in the case.
12:58:29 23 That would be highly confusing, and the jury is going to
12:58:35 24 have the ability to request any of the admitted exhibits
12:58:38 25 during their deliberations. They're not going to get

12:58:42 1 demonstratives. And exhibits are going to have to be
12:58:44 2 requested by the jury. I'm not going to send a wheelbarrow
12:58:49 3 full of exhibits back with the jury when they initially
12:58:51 4 retire to deliberate.

12:58:53 5 MR. HASLAM: I understand.

12:58:54 6 THE COURT: And you're aware of my practice in
12:58:55 7 that regard.

12:58:56 8 MR. HASLAM: Yes, I understand. And that's why I
12:59:00 9 prefaced that we're not -- we don't need to get those in,
12:59:03 10 but this really goes to can he testify about what people
12:59:05 11 knew -- what people knew in the ordinary skill in the art.
12:59:08 12 There's a treatise that talks about it --

12:59:11 13 THE COURT: And as long as it's purely prior
12:59:15 14 background, that's typically acceptable.

12:59:17 15 MR. HASLAM: That's what I thought, Your Honor.

12:59:18 16 THE COURT: What's -- what's Plaintiff's position?

12:59:21 17 MR. RUBIN: So, Your Honor, I think we are very
12:59:23 18 close on this MIL.

12:59:24 19 The concern is that Defendants may cross what we
12:59:30 20 think is -- is an impermissible -- a line to impermissible
12:59:35 21 opinions or -- or arguments concerning obviousness where
12:59:38 22 they take these opinions that are in the report that
12:59:44 23 certain elements -- or certain technical features that
12:59:48 24 aren't claim elements were known in these background art
12:59:51 25 references, which were not charted in their contentions,

12:59:55 1 and invite the jury to find obviousness based on that
12:59:58 2 disclosure.

12:59:58 3 So we think passing references to these -- these
01:00:05 4 things that were known in the art are probably fine, but
01:00:08 5 whereas repetitive or where it forms part of a presentation
01:00:13 6 or argument on obviousness, we think these uncharted
01:00:18 7 references just should not be part of that.

01:00:19 8 THE COURT: Well, let me ask you this. I mean,
01:00:22 9 this is going to come in through expert witnesses, and
01:00:27 10 expert witnesses are going to be bound by the parameters of
01:00:29 11 their reports. And you had an opportunity to move to
01:00:33 12 strike anything out of those reports that you think is
01:00:35 13 improper, irrelevant, unfairly prejudicial, or whatever
01:00:39 14 basis you want to raise.

01:00:40 15 Now you're asking me by way of limine to constrain
01:00:45 16 the expert beyond that report in a way that you haven't
01:00:48 17 particularly addressed in a motion to strike? I mean, if
01:00:51 18 it's in the expert's report as background on the prior art,
01:00:56 19 if it went too far in the report, you should have moved to
01:00:59 20 strike it. If you didn't move to strike it, why should I
01:01:02 21 limine it out in light of that?

01:01:04 22 MR. RUBIN: So, Your Honor --

01:01:06 23 THE COURT: That's my question.

01:01:09 24 MR. RUBIN: So the references are described in the
01:01:10 25 reports as background. And if they're used only for that

01:01:14 1 limited purpose and not in a way that goes beyond that to
01:01:20 2 invite the jury to use them as a basis for obviousness,
01:01:24 3 then that's fine. The concern that we have is so -- so
01:01:28 4 they -- the expert is not required to present his opinions
01:01:32 5 in the same order as the report.

01:01:36 6 THE COURT: True.

01:01:36 7 MR. RUBIN: And so if an opinion that's presented
01:01:41 8 in a report for background is instead used to suggest to
01:01:45 9 the jury an obviousness combination, we think that would be
01:01:48 10 inappropriate.

01:01:49 11 THE COURT: Well, in light of this discussion and
01:01:57 12 in light of the fact that Plaintiffs could have challenged
01:02:00 13 any portion of the expert's reports they think went beyond
01:02:04 14 mere background information with regard to items that are
01:02:11 15 unasserted prior art, I'm going to deny Plaintiff's Motion
01:02:15 16 in Limine No. 2.

01:02:16 17 Now, if as Plaintiff fears Defendant is going to
01:02:22 18 go beyond the scope of those expert reports and they're
01:02:24 19 going to try and have some backdoor obviousness combination
01:02:29 20 and camouflage it within the -- as -- as part of the
01:02:34 21 background of the prior art, you can certainly raise that
01:02:37 22 if it gets to that point.

01:02:39 23 And if -- if, in effect, your objection is
01:02:42 24 Plaintiff's asserting an uncharted, unaccused obviousness
01:02:48 25 combination by way of this, quote, background, then that's

01:02:51 1 improper. And if it really is that, I'll exclude it.

01:02:54 2 But I have -- I have faith in Mr. Haslam. When he

01:02:57 3 tells me it's going to be purely background, it's going to

01:03:00 4 be purely background. And I don't see any reason to grant

01:03:05 5 a limine order presuming that that's an unreliable

01:03:11 6 representation, especially when if it's so egregious in the

01:03:15 7 report, you should have challenged it as a motion to

01:03:18 8 strike, and that obviously didn't happen.

01:03:19 9 So if, in fact, there's some kind of backdoor

01:03:27 10 obviousness combination that's raised as a surprise, I'm

01:03:29 11 certainly going to stop that. But that's an extreme

01:03:32 12 example. And it's typically permissible for a Defendant to

01:03:35 13 outline the background of the art as a part of their

01:03:38 14 expert's testimony.

01:03:39 15 As long as this is -- is that, then it shouldn't

01:03:43 16 be subject to a limine order. So Plaintiff's -- with that

01:03:51 17 explanation, Plaintiff's Limine -- Motion in Limine No. 2

01:03:54 18 is denied.

01:03:55 19 What about Plaintiff's Motion in Limine No. 3?

01:03:58 20 MR. RUBIN: So, Your Honor, I can address that, as

01:04:01 21 well.

01:04:01 22 THE COURT: I was hoping you could since you

01:04:04 23 stayed at the podium.

01:04:05 24 MR. RUBIN: All right. So Samsung has on its

01:04:07 25 exhibit list dozens of -- or at least numerous Samsung

01:04:14 1 patents and patent applications. And we think it's
01:04:22 2 improp -- we -- Samsung should not be permitted to argue to
01:04:27 3 the jury that -- or to suggest to the jury -- to confuse
01:04:33 4 the jury with these Samsung patents to suggest that it
01:04:38 5 could not be infringing our patents because it itself has
01:04:42 6 patents on the same -- or on the technology used in its
01:04:45 7 products.

01:04:45 8 In Samsung's opposition, they point to several
01:04:53 9 exhibits that Dr. Fontecchio discusses, which they suggest
01:04:57 10 are appropriate exhibits to enter -- or to present to the
01:05:02 11 jury.

01:05:02 12 There may have been an -- an error in drafting
01:05:07 13 this because actually I think most of the exhibits that
01:05:10 14 they cite to are patents from Casio, a prior assignee of
01:05:15 15 two of the asserted patents in the case.

01:05:19 16 But one of the exhibits they point to, which is
01:05:22 17 DTX-431, illustrates the issue clearly.

01:05:27 18 The report from Dr. Fontecchio --

01:05:30 19 THE COURT: Let me stop you a minute, Mr. Rubin.
01:05:33 20 I made it clear just three minutes ago when Mr. Haslam was
01:05:36 21 at the podium that the Court doesn't intend to deal with
01:05:40 22 what are, in essence, exhibit disputes as a part of the
01:05:43 23 limine practice.

01:05:44 24 If these are patent applications or Samsung
01:05:51 25 patents that are going to be offered by Samsung as exhibits

01:05:54 1 to be pre-admitted and you have a basis to object to them,
01:05:59 2 whether it's relevance, probative value, or confusion to
01:06:03 3 the jury, that ought to be hashed out during the exhibit
01:06:06 4 processes.

01:06:06 5 To have exhibit disputes masquerading as motions
01:06:10 6 in limine is not, in my view, the proper way to go about
01:06:12 7 this. I'm not saying we won't do it, but that's not what
01:06:16 8 traditional limine practice is for.

01:06:19 9 MR. RUBIN: So, Your Honor, I was talking about
01:06:21 10 exhibits because that's what they pointed to in their
01:06:24 11 opposition, but the -- the real issue here concerns the
01:06:27 12 argument that they want to make.

01:06:33 13 So Dr. Fontecchio has a paragraph in his report
01:06:36 14 where he says: This Samsung patent shows the
01:06:40 15 seven-transistor circuit that they use in their products.
01:06:43 16 He then goes on to cite 20 Samsung -- Samsung internal
01:06:48 17 technical documents that also show that seven-transistor
01:06:51 18 circuit. So he doesn't need the Samsung patent to show how
01:06:55 19 the products work. The prod -- the documents that actually
01:06:57 20 describe the products show how the products work.

01:07:00 21 The reason that he refers to the Samsung patent is
01:07:06 22 to make a point, which we think will be confusing for the
01:07:08 23 jury and prejudicial, that Samsung has a patent on that
01:07:11 24 seven-transistor circuit.

01:07:15 25 Frankly, it's irrelevant to any issue in this case

01:07:19 1 whether Samsung has a -- has a patent that may cover its
01:07:21 2 products. And the only reason for them to point that out
01:07:30 3 to the jury is to confuse the jury and to invite the jury
01:07:34 4 to draw the inference that they can't be infringing our
01:07:38 5 patent because they themselves got a patent.

01:07:41 6 THE COURT: So in light of that, tell me why this
01:07:44 7 wasn't raised as a Daubert motion or a motion to strike.
01:07:47 8 If it's in the report, if it's a backdoor way to waive
01:07:51 9 Samsung's patents on seven-transistor products in front of
01:07:54 10 the jury to undermine your infringement theories, why
01:07:57 11 didn't you challenge the expert's report under Daubert?

01:08:01 12 MR. RUBIN: Well, Your Honor, the actual opinions
01:08:03 13 that are offered concerning the seven-transistor circuit
01:08:10 14 which don't really rely on the Samsung patent, we don't
01:08:14 15 have any objection to. Everybody agrees that the
01:08:20 16 seven-transistor circuit is used in the products.

01:08:22 17 So we didn't see this as a -- a challenge to the
01:08:27 18 sufficiency or reliability of the opinions. This is an
01:08:29 19 issue of -- of prejudice, which we -- we didn't feel --

01:08:34 20 THE COURT: Well, let me say this -- let me say
01:08:37 21 this. I don't expect the Defendant to get up before this
01:08:40 22 jury and tout its patent portfolio that's unrelated to
01:08:47 23 what's asserted in this case, to claim it has thousands of
01:08:52 24 patents, and it's a world class cutting edge IP company and
01:08:55 25 basically try to bolster its position with regard to

01:08:59 1 unasserted patents that relate to unasserted technology.

01:09:02 2 There's not going to be this kind of we have more
01:09:04 3 patents than you have, so we're the good guys, and you're
01:09:06 4 the bad guys. We're not going to -- we're not going to
01:09:09 5 create damages by counting the number of patents. We're
01:09:12 6 not going to create liability issues on who has more
01:09:17 7 patents and who doesn't have that many patents.

01:09:20 8 Now, that's improper. If that's what you're
01:09:29 9 getting at, that's not clear to me. If you're trying to,
01:09:33 10 on the other hand, tell me that there's a provision in
01:09:34 11 their expert's report where he talks about Samsung patents
01:09:39 12 and applications in a way that's improper, my question is
01:09:42 13 why didn't you challenge that expert's report?

01:09:45 14 I really -- I really am not sure what you're
01:09:47 15 trying to get to here, counsel. Maybe you could clarify
01:09:50 16 that for me.

01:09:51 17 MR. RUBIN: Well, Your Honor, we are -- we do have
01:09:55 18 a concern, which is the one that you just pointed to about
01:10:02 19 showing a large number of Samsung patents. And so we
01:10:09 20 think --

01:10:09 21 THE COURT: There's -- there's nothing wrong with
01:10:11 22 Samsung saying they own patents.

01:10:13 23 MR. RUBIN: No, Your Honor.

01:10:14 24 THE COURT: But we're not going to talk about how
01:10:16 25 many they have versus how many you have. This is not a

01:10:19 1 schoolyard fight where my brother's bigger than your
01:10:26 2 brother, and, therefore, we're going to win the tussle on
01:10:28 3 the playground. That's not how this is going to get tried.

01:10:31 4 MR. RUBIN: So, Your Honor, the reason that I was
01:10:33 5 talking about DTX-431 is this is the one example of a
01:10:38 6 Samsung patent that they point to in opposing our motion in
01:10:40 7 limine. So I was trying to respond to the arguments that
01:10:46 8 they made in their brief and to show how it actually --
01:10:51 9 what they cited in their brief helps to illustrate the
01:10:54 10 problem that -- that we're concerned about.

01:10:58 11 THE COURT: Let me do this, Mr. Rubin, let me hear
01:11:00 12 from Samsung on this. Maybe that will give me some
01:11:03 13 clarity.

01:11:10 14 MR. HASLAM: The one thing we're not going to do
01:11:12 15 is count patents and say we have more patents than they do.
01:11:16 16 This relates to --

01:11:17 17 THE COURT: Tell me what you do want to do, and
01:11:19 18 then I'll determine whether it's appropriate or not.

01:11:21 19 MR. HASLAM: Just as a preface, as we cited in our
01:11:23 20 briefs, our patents may be relevant and are relevant, we
01:11:31 21 believe, to the issue of willfulness.

01:11:32 22 The patents -- and it's a handful of them. It
01:11:35 23 will be four or five at most, either for our expert or for
01:11:38 24 crossing their experts. One set of patents deals with --
01:11:46 25 and it -- it's -- the filing dates on these predate the

01:11:49 1 dates of the relevant patents.

01:11:52 2 So for the '311, one of the non-infringement
01:11:54 3 arguments we have in this case is we do not have a
01:12:00 4 substrate that has a touch sensor which is configured to
01:12:03 5 wrap around a display. It's disputed. We -- we put the
01:12:10 6 touch sensor directly on the display with no substrate.

01:12:13 7 Now, it's a disputed issue as to whether what it's
01:12:16 8 on is part of the display or a separate substrate. We have
01:12:20 9 patents that deal with integrating the touch sensor
01:12:25 10 directly into the display. And it is relevant to show our
01:12:30 11 good faith that we thought what we were doing was
01:12:34 12 different.

01:12:34 13 The jury may disagree with us because that issue
01:12:36 14 is going to go to the jury. Likewise, on the '2 -- on the
01:12:42 15 '338, predating the '338 patent, we began working -- going
01:12:48 16 from a two or a three-transistor, such as the '450 and the
01:12:55 17 '338, to begin moving towards a multiple transistor
01:13:00 18 embodiment, including what we now have as the
01:13:03 19 seven-transistor embodiment.

01:13:04 20 So it is focused, targeted, and it -- it is going
01:13:08 21 to be argued not that we don't infringe or that because we
01:13:13 22 have a patent we don't infringe, but that it goes to our
01:13:17 23 good faith.

01:13:17 24 And -- and I will just add, I think it's relevant
01:13:23 25 because in numerous mock juries that I have listened to,

01:13:27 1 the panel almost always asks, well, if this is different,
01:13:33 2 where is their patent? And I think it's relevant for us to
01:13:37 3 see here's -- we thought these differences were significant
01:13:43 4 enough to try to get a patent on it.

01:13:44 5 And we're not going to argue that that's the be
01:13:47 6 all and end all, forget it. But it is show -- does show
01:13:50 7 that we believe enough that we were different than what was
01:13:53 8 in the prior art that we went ahead and patented what we
01:13:58 9 thought was novel, which was integrating the touch sensor
01:14:02 10 with a display or going to a seven-transistor
01:14:06 11 implementation.

01:14:08 12 And that's --

01:14:09 13 THE COURT: Well, certainly, Mr. Haslam, the
01:14:13 14 Defendant can explain to the jury the history of its
01:14:19 15 products and how it got there. And I don't see any reason
01:14:35 16 why you can't present a narrative about the ark of your
01:14:43 17 products. However, I think there -- I think there needs to
01:14:51 18 be some gatekeeping as to what you say as regards to your
01:14:56 19 prior patents.

01:15:00 20 I'm not telling you that there may not be a
01:15:03 21 context in which that's relevant. I am telling you that
01:15:09 22 it's hard enough to keep the jury focused on the three
01:15:12 23 asserted patents in this case without additional extraneous
01:15:17 24 patents flying around left and right. And there is very
01:15:20 25 real risk of confusion here.

01:15:22 1 I'm much of the same mind as I was earlier, that
01:15:27 2 as you present your narrative from the Defendants'
01:15:29 3 standpoint, if there's a place in that process where it
01:15:35 4 makes sense to mention that you have patented protection on
01:15:40 5 a certain aspect of it, you can certainly approach and ask
01:15:43 6 for leave.

01:15:44 7 But I'm not prepared to say you can talk about as
01:15:47 8 many different additional Samsung patents as you want to.
01:15:50 9 I just think that opens the door to confusion. And as I
01:15:58 10 say, the focus of this trial needs to be on the asserted
01:16:00 11 claims of the three asserted patents. And I -- I feel part
01:16:05 12 of my responsibility is try to avoid any confusion and keep
01:16:08 13 the jury focused on the issues here.

01:16:11 14 I'm not telling you I'm not going to let you
01:16:13 15 mention what you've said. But I'm going to have to hear
01:16:16 16 that narrative from you and have the context of how it's
01:16:21 17 presented, and then let you make your request. Is that
01:16:24 18 understood?

01:16:24 19 MR. HASLAM: I understand, Your Honor. And
01:16:27 20 just -- I never intended to, and clearly won't, I don't
01:16:31 21 intend to try to go through the drawings and the claims of
01:16:33 22 those patents. Essentially, I think the title or one
01:16:38 23 figure may be enough to just say we had a patent on this,
01:16:40 24 or we have a patent on that, and that's about it.

01:16:42 25 THE COURT: There again, I'll be in a better

01:16:45 1 position to know when I've heard everything, and then you
01:16:47 2 tell me exactly what you do or don't want to show the jury.

01:16:50 3 MR. HASLAM: Understood.

01:16:51 4 THE COURT: So to enforce the Court's gatekeeping
01:16:57 5 role and to carry out what I've just said in the record,
01:17:00 6 I'm going to grant Plaintiff's Motion in Limine No. 3.

01:17:03 7 And I'll carry any requests for leave to go into
01:17:09 8 Defendants' patents as indicated in the context of the
01:17:14 9 real-time presentation of the evidence.

01:17:16 10 All right. Next is Plaintiff's Motion in Limine
01:17:19 11 No. 4.

01:17:20 12 What is the status of this, counsel?

01:17:23 13 MS. HENRY: I'm happy to report that we have an
01:17:29 14 agreement on 4, 5, 6, and 7. I'm happy -- well, I say I
01:17:33 15 have an agreement on 4, 5, and 7. We're going to drop 6,
01:17:37 16 so that takes care of the next four. I'm happy to read
01:17:41 17 those agreements into the record.

01:17:42 18 THE COURT: Tell me -- let's start with
01:17:43 19 Plaintiff's MIL No. 4, Ms. Henry.

01:17:45 20 MS. HENRY: No. 4, the agreed MIL is Defendants
01:17:48 21 will not present evidence or argument regarding Russ August
01:17:50 22 & Kabat's involvement in Solas's acquisition of the
01:17:52 23 patents-in-suit, including any contingent fee agreement,
01:17:56 24 possible role as buyer, or ownership interest.
01:17:59 25 Defendants, however, may present evidence and

01:18:01 1 argument that Solas was represented by experienced patent
01:18:03 2 counsel in the patent acquisition process.

01:18:05 3 THE COURT: Is that agreed to by the Defendant,
01:18:08 4 Mr. Haslam?

01:18:08 5 MR. HASLAM: Yes, it is, Your Honor.

01:18:10 6 THE COURT: Then I'll order Plaintiff's MIL No. 4
01:18:13 7 granted as agreed to and as recited into the record.

01:18:17 8 And in a little bit slower fashion, Ms. Henry,
01:18:21 9 tell me what the agreement on No. 5 is.

01:18:23 10 MS. HENRY: Yes, Your Honor.

01:18:24 11 The agreement on MIL 5 is Defendants agree to not
01:18:27 12 introduce evidence or argument calling Magnetar Capital or
01:18:32 13 any entity involved with Solas a hedge fund or similar
01:18:36 14 investment vehicle, e.g., private equity or investor fund.
01:18:41 15 References of this type will be redacted from pre-admitted
01:18:45 16 documents and deposition designations. This does not
01:18:47 17 preclude Defendants from introducing evidence that Solas
01:18:50 18 has investors and/or partners generally.

01:18:53 19 THE COURT: Do Defendants agree with that
01:18:56 20 representation?

01:18:56 21 MR. HASLAM: Yes, Your Honor.

01:18:57 22 THE COURT: All right. Based on the agreement of
01:18:58 23 the parties, I'll grant Plaintiff's Motion in Limine No. 5
01:19:03 24 as announced into the record.

01:19:04 25 And do I understand, Ms. Henry, the Plaintiffs are

01:19:10 1 withdrawing the requested Motion in Limine No. 6?

01:19:12 2 MS. HENRY: That's correct, Your Honor.

01:19:13 3 THE COURT: Then it's withdrawn.

01:19:14 4 That brings us to Plaintiff's Motion in Limine No.

01:19:17 5 7.

01:19:18 6 What's the potential agreement here?

01:19:19 7 MS. HENRY: Our agreement is that Defendants will

01:19:21 8 agree not to use the terms "troll," "pirate," "NPE,"

01:19:28 9 "non-practicing entity," or "patent assertion entity" to

01:19:30 10 refer to Solas. Defendants are not precluded from raising

01:19:33 11 any argument, evidence, or testimony that Solas does not

01:19:37 12 manufacture or sell products. Defendants are also not

01:19:40 13 precluded from disclosing Solas's business -- discussing

01:19:44 14 Solas's business model.

01:19:46 15 THE COURT: All right. Is there agreement on this

01:19:48 16 from the Defendants?

01:19:49 17 MR. HASLAM: Yes, Your Honor.

01:19:49 18 THE COURT: Then pursuant to the parties'

01:19:53 19 agreement, the Court grants Plaintiff's Motion in Limine

01:19:55 20 No. 7 as announced into the record.

01:19:57 21 That brings us to Plaintiff's Motion in Limine

01:20:00 22 No. 8.

01:20:01 23 Where are we on this, counsel?

01:20:03 24 MS. HENRY: We have an agreement on that one, as

01:20:05 25 well, Your Honor.

01:20:05 1 THE COURT: Let me hear from you then.

01:20:06 2 MS. HENRY: The agreement is that that MIL will be

01:20:09 3 granted. Samsung will redact the lump-sum amounts from the

01:20:13 4 licenses referenced in that motion in limine. And Solas

01:20:15 5 will not insinuate those lump-sum amounts were large.

01:20:20 6 I apologize. That one is not quite as eloquent.

01:20:25 7 It was an agreement made over the lunch hour.

01:20:26 8 THE COURT: All right. Is there any concern or

01:20:28 9 question about exactly which agreements and which numbers

01:20:31 10 in those agreements we're talking about? Both -- both

01:20:34 11 sides --

01:20:34 12 MS. HENRY: I don't believe so, Your Honor.

01:20:35 13 THE COURT: Are both sides on the same --

01:20:37 14 MS. HENRY: I'll left Defendant --

01:20:38 15 MR. HASLAM: Yes. We will redact the amounts, but

01:20:40 16 the licenses will come in simply to show that they were

01:20:44 17 lump-sum licenses without the amounts.

01:20:47 18 THE COURT: All right. Based on the parties'

01:20:51 19 agreement as stated into the record, I'll grant Plaintiff's

01:20:53 20 Motion in Limine No. 8.

01:20:54 21 What about Plaintiff's No. 9?

01:20:57 22 MS. HENRY: That one is also resolved, Your Honor.

01:20:59 23 The parties agree that that motion in limine should be

01:21:01 24 granted based on the Court's earlier rulings on the

01:21:04 25 dispositive motions.

01:21:05 1 THE COURT: Defendants concur with that

01:21:07 2 representation?

01:21:07 3 MR. HASLAM: Yes, Your Honor.

01:21:09 4 THE COURT: Then Plaintiff's Motion in Limine No.

01:21:11 5 9 is granted.

01:21:12 6 What about Plaintiff's Motion in Limine No. 10?

01:21:17 7 MS. HENRY: Solas withdraws -- excuse me, Motion

01:21:21 8 in Limine No. 10.

01:21:21 9 THE COURT: Plaintiff's No. 10 is withdrawn.

01:21:25 10 What about Plaintiff's No. 11?

01:21:27 11 MS. HENRY: We have an agreement, Your Honor.

01:21:29 12 That one was included in the joint filing. I do have it if

01:21:32 13 you'd like me to read it into the record to be a hundred

01:21:36 14 percent clear.

01:21:36 15 THE COURT: I'd like it in the record to be a

01:21:38 16 hundred percent clear.

01:21:47 17 MS. HENRY: This language is -- was included in

01:21:50 18 the parties' joint filing that was filed on the 7th. I

01:21:50 19 apologize. I don't have the document number. But that

01:21:56 20 agreement is Defendants will not present evidence or

01:21:57 21 testimony before the jury related solely to any of their

01:22:00 22 equitable defenses.

01:22:03 23 THE COURT: Defendants concur with that as agreed

01:22:05 24 to?

01:22:05 25 MR. HASLAM: Yes, Your Honor.

01:22:06 1 THE COURT: Then Plaintiff's Motion in Limine No.

01:22:09 2 11 is granted as agreed and as announced into the record.

01:22:14 3 All right. Are you aware of any other disputed

01:22:18 4 motions in limine urged by the Plaintiff that haven't been

01:22:20 5 addressed by the Court, Ms. Henry?

01:22:21 6 MS. HENRY: No, Your Honor.

01:22:22 7 THE COURT: All right. Then let's move to

01:22:24 8 Defendants' motions in limine, beginning with Defendants'

01:22:29 9 Motion in Limine No. 1.

01:22:30 10 What's the status of this?

01:22:39 11 MS. HENRY: That one is not mine, Your Honor. So

01:22:41 12 I'm just going to say I -- I'm not sure. I don't think we

01:22:44 13 have an agreement on Motion in Limine -- Defendants' Motion

01:22:47 14 in Limine No. 1, I don't believe.

01:22:49 15 MR. LERNER: That's right.

01:22:50 16 THE COURT: Then let me hear what Defendants'

01:22:52 17 posture is.

01:22:53 18 MR. LERNER: Your Honor, in this motion, we're

01:22:57 19 seeking to preclude any testimony by Mr. Credelle about

01:23:00 20 non-infringing alternatives. And this is one we had hoped

01:23:02 21 to resolve.

01:23:03 22 He doesn't have opinions in his expert report

01:23:05 23 about non-infringing alternatives. And there appears to be

01:23:08 24 a dispute about three paragraphs in his report. Solas

01:23:14 25 cites 182 to '84 where he says he understands Samsung has

01:23:18 1 not identified design-arounds. He gives a legal standard
01:23:22 2 for non-infringing alternatives. And then he says in
01:23:26 3 Paragraph 184: To the extent that Samsung or its experts
01:23:31 4 attempt to argue about the viability of design-arounds or
01:23:34 5 non-infringing alternatives to the asserted patents, I
01:23:36 6 disagree and reserve the right to supplement and to respond
01:23:39 7 to any new arguments Samsung raises.

01:23:41 8 We don't believe that's a -- we just want to
01:23:44 9 confirm that he can't offer opinions about the specific
01:23:48 10 non-infringing alternatives that he hasn't addressed. He
01:23:50 11 didn't address any of them or give any reasons.

01:23:53 12 And the other part is the -- Solas cites
01:23:58 13 statements in his opening and rebuttal reports about
01:24:01 14 benefits of metal mesh touch sensors over ITO. That -- we
01:24:07 15 don't take any issue with him testifying to those
01:24:09 16 statements, but they don't get to the issue, which is
01:24:13 17 products that have the ITO were a non-infringing
01:24:13 18 alternative.

01:24:16 19 And the fact that there might be some arguable
01:24:20 20 disadvantages to ITO doesn't get to that issue. It's -- if
01:24:23 21 he wants to say ITO is not as good as metal mesh,
01:24:28 22 consistent with his report, we -- we see no issue. It's
01:24:31 23 that he didn't offer an opinion that ITO would be
01:24:38 24 unsuitable for the accused device -- devices.

01:24:38 25 THE COURT: Well, I don't know how many times I

01:24:40 1 have to say it, but the expert witnesses in this case are
01:24:43 2 going to be constrained to their reports, and they're not
01:24:45 3 going to testify beyond the scope of their reports.

01:24:48 4 And if an expert has rendered a report that says,
01:24:52 5 I reserve the right to supplement it and they have not
01:24:55 6 sought and obtained leave of the Court to submit a
01:24:59 7 supplemental report and that supplemental report has not
01:25:01 8 been presented with the Court's approval, they're not going
01:25:04 9 to supplement it on the fly in real-time as a surprise or
01:25:09 10 an ambush to the other side.

01:25:10 11 I don't know why this should be before me as a
01:25:12 12 motion in limine. The rules are expert witnesses are
01:25:19 13 constrained and confined to the content of their reports,
01:25:22 14 no more, no less.

01:25:24 15 So if Mr. Credelle attempts to testify beyond the
01:25:29 16 scope of his report, that and that alone should be a basis
01:25:33 17 for the Defendant to object to it. And if I'm persuaded
01:25:38 18 that that's correct, I'll exclude it.

01:25:39 19 But this, again, gets back to the fact that that
01:25:42 20 process is highly disruptive. And I've already addressed
01:25:45 21 it earlier in these pre-trial proceedings to make it
01:25:51 22 sure -- make it clear that either party who wants to raise
01:25:54 23 that objection needs to be darned sure they're on solid
01:25:58 24 ground before they do because it's not a simple, you know,
01:26:03 25 sustained or overruled. It's send out the jury, get the

01:26:06 1 report, go through the process, hear the argument.

01:26:09 2 I will say this to you, and I need to make this
01:26:13 3 clear to both sides. To the extent over the course of the
01:26:16 4 trial that one party or the other raises an objection that
01:26:20 5 an expert witness is attempting to exceed the scope of
01:26:23 6 their reports and I have to send the jury out and get to
01:26:26 7 the bottom of it like I've indicated, then all the time
01:26:30 8 that it takes to do that is going to be charged to whoever
01:26:34 9 comes out on the short end of that objection.

01:26:36 10 And so you're going to be using trial time.

01:26:39 11 That's -- because, quite honestly, that can take 15 or 20
01:26:43 12 minutes in the middle of an examination of a witness, which
01:26:46 13 is indicative of how -- how highly disruptive it is.

01:26:49 14 Certainly, if it's warranted and it's supported
01:26:52 15 and it's clear that the experts stepped across the line,
01:26:55 16 make the objection. And the other side will bear the cost
01:26:59 17 of the time that's wasted to confirm that.

01:27:01 18 But I don't know why this should be before me as
01:27:04 19 a -- as a limine matter, Mr. Lerner.

01:27:07 20 MR. LERNER: It was the reservation of rights,
01:27:10 21 Your Honor.

01:27:10 22 THE COURT: Can you tell me?

01:27:10 23 MR. LERNER: And --

01:27:11 24 THE COURT: It's what?

01:27:12 25 MR. LERNER: It's the reservation of rights, and

01:27:14 1 we thought that Plaintiffs would have agreed to this, and
01:27:16 2 it was the lack -- maybe we should hear from them -- the
01:27:18 3 lack of agreement that gave us concern. We recognize we
01:27:21 4 don't want to disrupt trial over these issues that could
01:27:24 5 have been addressed before.

01:27:28 6 But that was why we raised it, Your Honor, to --
01:27:29 7 to confirm that this reservation of rights or this blanket
01:27:32 8 statement to the extent they argue this, I disagree, would
01:27:35 9 not support some later opinions that have not been
01:27:38 10 disclosed.

01:27:39 11 THE COURT: Well, let me hear from the Plaintiff
01:27:40 12 on this.

01:27:40 13 What's Plaintiff's position, and why am I -- why
01:27:43 14 am I hearing about this now?

01:27:45 15 MR. BUCZKO: Your Honor, Jacob Buczko for
01:27:47 16 Plaintiff.

01:27:47 17 So the reason why you're hearing about this now is
01:27:51 18 that -- so Samsung moved to exclude Mr. Credelle from
01:27:56 19 testifying with regard to non-infringing alternatives.
01:27:58 20 There are disclosed opinions with regard to non-infringing
01:28:02 21 alternatives in his report.

01:28:03 22 And I can refer to, for example, his rebuttal
01:28:07 23 report where he describes the benefits of the technology
01:28:09 24 covered by the '311 patent in comparison to the alternative
01:28:15 25 ITO sensors. And he goes on for about 10 paragraphs on

01:28:19 1 that.

01:28:19 2 So that being in his report and being mentioned as
01:28:22 3 an alternative is a fair topic of testimony.

01:28:25 4 THE COURT: I don't know how to be any clearer.

01:28:27 5 If it's in his report, it's fair game. If it's not in the
01:28:30 6 report, it's improper. And -- and both sides ought to be
01:28:33 7 able to read the same report and determine in the same
01:28:36 8 fashion that this is either in or out of the report.

01:28:39 9 MR. BUCZKO: Thank you, Your Honor.

01:28:40 10 I think Defendants' position is that that
01:28:44 11 testimony in his report has nothing to do with
01:28:46 12 alternatives, even though it talks about alternatives, and
01:28:48 13 it talks about the disclosed Samsung alternative of using
01:28:52 14 the ITO sensor.

01:28:54 15 So I think that's where the confusion is between
01:28:56 16 the parties. I agree, I don't think that there's a live
01:28:58 17 issue here anymore.

01:29:00 18 THE COURT: Well, let me -- let me just make it
01:29:01 19 very clear. Both sides will be well served in examining
01:29:07 20 their experts in the manner that hews as closely as
01:29:11 21 possible to the text of their written reports.

01:29:13 22 I'm going to deny Defendants' Motion in Limine No.
01:29:16 23 1. This is clearly addressed by the Court's previous
01:29:20 24 directives to ensure that expert witnesses on both sides
01:29:24 25 are constrained by the contents of their reports with

01:29:31 1 regard to their testimony before the jury.

01:29:33 2 All right. That brings us to Defendants' Motion
01:29:35 3 in Limine No. 2.

01:29:36 4 MR. HASLAM: That one is withdrawn, Your Honor.

01:29:38 5 THE COURT: All right. Defendants' Motion in
01:29:41 6 Limine No. 2 is withdrawn.

01:29:42 7 What about Defendants' Motion in Limine No. 3?

01:29:46 8 MR. CHO: Good afternoon, Your Honor. Daniel Cho
01:29:48 9 on behalf of Defendants. I'm not listed as the arguing
01:29:51 10 attorney on this motion, but with your permission, I'd like
01:29:53 11 to argue it.

01:29:53 12 THE COURT: You've appeared in the case?

01:29:54 13 MR. CHO: Yes, I have.

01:29:55 14 THE COURT: Please proceed.

01:29:56 15 MR. CHO: Solas should be precluded from offering
01:30:01 16 evidence or argument concerning secondary considerations.
01:30:01 17 There are several reasons for this.

01:30:06 18 First, under the Federal Rules of Civil Procedure,
01:30:06 19 they have not disclosed during fact discovery their factual
01:30:09 20 basis for at least the secondary considerations of copying
01:30:12 21 and praise.

01:30:13 22 We served a contention rog on this early in fact
01:30:17 23 discovery. We followed up about it. They never
01:30:19 24 supplemented throughout fact discovery. This is
01:30:21 25 prejudicial, Your Honor, because we had no notice to

01:30:24 1 prepare our expert report in response to what Defendants --
01:30:28 2 what Solas disclosed on June 22nd in their rebuttal report,
01:30:33 3 the secondary considerations of copying and praise.

01:30:37 4 For copying, in particular, Your Honor, there's no
01:30:42 5 expert opinion from Solas concerning any products or
01:30:43 6 embodiments that practice the asserted patents. And for
01:30:45 7 the '311 patent, the one that covers the touch sensor -- is
01:30:50 8 directed to the touch sensor, there's some vague
01:30:52 9 accusations as to copying Atmel's samples by Samsung
01:30:56 10 Display, but without any evidence that what Samsung Display
01:30:59 11 received was actually an embodiment of the invention.

01:31:02 12 This is highly confusing to the jury. It's
01:31:05 13 prejudicial. And Solas should not be permitted to rely on
01:31:08 14 insinuations of copying when there's simply no record
01:31:11 15 evidence to support it.

01:31:12 16 For various other secondary considerations, Your
01:31:16 17 Honor, Solas's expert -- no opinions about nexus, tying the
01:31:21 18 secondary considerations to the actual claimed invention,
01:31:25 19 particularly to the novel step of the asserted claims.

01:31:30 20 Solas's experts try to offer Defendants' sales of
01:31:36 21 the accused products as evidence of commercial success.
01:31:39 22 But there is no nexus there to the merits of the actual
01:31:44 23 claimed inventions.

01:31:45 24 Defendants phones, as you know, as we've been
01:31:48 25 talking about, have many, many components and features

01:31:52 1 beyond just the OLED display directed by the '338 and '450
01:31:59 2 patents and the touch sensor for the '311 patent.

01:32:02 3 And for that reason, Your Honor, without tying any
01:32:05 4 of the secondary considerations to what is actually claimed
01:32:05 5 in the -- in the asserted patents, particularly where the
01:32:10 6 claims are not directed to the overall consumer phones that
01:32:13 7 are accused but to smaller components, any discussion or
01:32:17 8 argument will be confusing to the jury and prejudicial.

01:32:19 9 THE COURT: Let me hear from Solas in response.

01:32:23 10 MR. RUBIN: Thank you, Your Honor.

01:32:35 11 MIL No. 3 should be rejected for a number of
01:32:40 12 reasons, but probably the most important one is that it --
01:32:45 13 it is an untimely Daubert motion.

01:32:48 14 The -- most of the briefing on this, about three
01:32:53 15 pages of it, are devoted to arguments concerning the
01:32:56 16 sufficiency or reliability of the opinion -- the expert
01:33:00 17 opinions that they're challenging, whether they've shown --
01:33:05 18 whether the experts have shown a nexus, whether our damages
01:33:12 19 expert's opinions properly were related to commercial
01:33:14 20 success or instead to Georgia-Pacific Factor 8.

01:33:17 21 These are all the sorts of things that should have
01:33:20 22 been challenged as a Daubert -- the issues that should have
01:33:24 23 been raised in the Daubert motion if they were seeking to
01:33:26 24 exclude the testimony.

01:33:27 25 The same is true of the argument that the

01:33:34 1 secondary considerations were not disclosed in our
01:33:38 2 discovery responses, but there, in fact, the opinions that
01:33:43 3 the experts offer were fairly disclosed.

01:33:48 4 Our interrogatory response, for example, talks
01:33:51 5 about failure -- failure by others, including Samsung, and
01:34:00 6 Mr. Credelle's opinions in the report that they're seeking
01:34:03 7 to exclude talk about how Samsung failed to develop, for
01:34:14 8 example, certain touch sensor technology and turn to Atmel,
01:34:20 9 a supplier of theirs, for information on how to make their
01:34:25 10 products better.

01:34:25 11 So the secondary -- the -- the opinion that
01:34:31 12 offered was actually disclosed -- or the type of opinion
01:34:36 13 that would be offered was disclosed in the discovery
01:34:39 14 responses.

01:34:40 15 So for those reasons, the MIL should be denied.

01:34:42 16 THE COURT: All right. Well, with regard to this
01:34:51 17 matter, the Court's persuaded that this really is a late
01:34:58 18 and improper Daubert motion. And for that reason, I'm
01:35:05 19 going to deny Defendants' Motion in Limine No. 3.

01:35:07 20 All right. Defendants' Motion in Limine No. 4. I
01:35:22 21 assume we have an agreement because we're not going to talk
01:35:24 22 about discovery disputes in front of the jury.

01:35:26 23 MR. GILLAM: Gil Gillam for Samsung. I would
01:35:29 24 assume so, as well, Your Honor.

01:35:30 25 The reason we're having some discussion about it

01:35:33 1 is based on the discussions that we had with counsel,
01:35:37 2 particularly this particular area.

01:35:38 3 They indicated that they wanted to perhaps discuss
01:35:42 4 with an expert the fact that Samsung had not produced any
01:35:47 5 documents in support of something. I said if that's as far
01:35:50 6 as you want to go with it, that's fine.

01:35:52 7 But I said, if you want to say to that expert,
01:35:55 8 Samsung had a duty to provide documents and then Samsung
01:36:00 9 failed to provide those documents, then what they're doing
01:36:03 10 is setting up the duty and the failure to meet that duty
01:36:07 11 which should have been brought to the Court. So it's a
01:36:09 12 matter of how they present the questions.

01:36:11 13 So, basically, during the lunch hour, I think we
01:36:13 14 arrived at some language which we think would probably
01:36:16 15 cover this, and that would be that there would be no
01:36:21 16 evidence, argument, or suggestion relating to the -- to the
01:36:23 17 parties' discovery obligations, discovery disputes, or
01:36:31 18 discovery deficiencies. And I thought we had a deal on
01:36:34 19 that, but they seem to be concerned about deficiencies.

01:36:36 20 If they are complaining about deficiencies, again,
01:36:39 21 Your Honor, that should have been brought to the Court. So
01:36:41 22 that's what the dispute is.

01:36:42 23 THE COURT: What's the Plaintiff's position?

01:36:45 24 MR. HOFFMAN: Your Honor, the only concern is that
01:36:52 25 the word "deficiency" not be read to exclude pointing out

01:36:57 1 where -- having the witnesses or the attorneys say there's
01:37:02 2 a lack of evidence or that Defendants produced no evidence
01:37:04 3 on this point. That could be considered a deficiency.
01:37:07 4 It's not really a discovery dispute. So we had a concern
01:37:10 5 about the vagueness of the word "deficiency."

01:37:13 6 As long as they agree that the deficiency does not
01:37:15 7 cover that situation, and it's on the record here, then
01:37:19 8 that -- that language is fine.

01:37:20 9 THE COURT: That's what I thought I heard
01:37:22 10 Mr. Gillam say when he went to the podium.

01:37:24 11 Mr. Gillam, what's your response?

01:37:26 12 MR. GILLAM: That's correct, Your Honor. As long
01:37:28 13 as they -- as long as neither side frames it in some way
01:37:34 14 that there was a dispute or deficiency insofar as an
01:37:38 15 obligation of this Court's rules, I'm fine with that.

01:37:42 16 As far as us saying they had no evidence of
01:37:44 17 infringement on this particular patent, we should be able
01:37:45 18 to argue that. If they want to say they had no evidence
01:37:49 19 with respect to this particular invalidity matter, they
01:37:54 20 should be able to argue that. We have no problem with
01:37:57 21 that. It's the discovery disputes.

01:37:58 22 THE COURT: Read -- read again to me, Mr. Gillam,
01:38:02 23 the language you read earlier.

01:38:03 24 MR. GILLAM: Yes, Your Honor.

01:38:04 25 No evidence, argument, or suggestion relating to

01:38:10 1 the parties' discovery obligations, discovery disputes, or
01:38:17 2 discovery deficiencies.

01:38:21 3 THE COURT: I'm going to grant Defendants' Motion
01:38:23 4 in Limine No. 4 on the basis just read into the record.
01:38:27 5 No. 5. Do we have a dispute regarding burden of
01:38:34 6 proof?

01:38:34 7 MR. CHO: Your Honor, we're pleased to report we
01:38:37 8 have an agreement on this MIL. I'm happy to read it into
01:38:40 9 the record.

01:38:40 10 THE COURT: Please do.

01:38:41 11 MR. CHO: It's rather lengthy.

01:38:43 12 THE COURT: Just read it slowly.

01:38:45 13 MR. CHO: The parties shall not -- Agreed to
01:38:49 14 Defendants' Motion in Limine No. 5: The parties shall not
01:38:52 15 make reference to the clear and convincing burden of proof
01:38:58 16 in a different area of the law, e.g., the burden of proof
01:38:58 17 required to commit an individual to an institution, revoke
01:39:03 18 parental rights, or terminate life support during opening,
01:39:06 19 closing, or the presentation of evidence.

01:39:08 20 With respect to voir dire, a party may only
01:39:11 21 inquire whether a potential juror's prior life experience
01:39:15 22 in another area of law would interfere with the ability to
01:39:19 23 apply the clear and convincing evidence standard, as the
01:39:20 24 Court has instructed them, if and only if a party
01:39:24 25 establishes that either, one, a potential juror served as a

01:39:29 1 juror previously and that case involved a clear and
01:39:33 2 convincing standard; or, two, a potential juror has been
01:39:38 3 involved in litigation, i.e., either as a party or as -- as
01:39:41 4 a witness or as a close family member or friend of a party
01:39:46 5 or witness to a litigation that involved the clear and
01:39:48 6 convincing standard. For the sake of clarity, a party may
01:39:51 7 inquire generally whether members of the panel have
01:39:55 8 experience in cases involving family law, divorce, or civil
01:40:00 9 commitment. If any member of the panel answers
01:40:01 10 affirmatively, the party may then take up any further
01:40:04 11 inquiry about the nature of the case at the bench with that
01:40:07 12 member and counsel present without potentially tainting
01:40:10 13 anyone else on the panel.

01:40:12 14 THE COURT: Does that accurately reflect the
01:40:15 15 agreement of the parties as far as the Plaintiff is
01:40:18 16 concerned?

01:40:18 17 MS. HENRY: Yes, Your Honor.

01:40:19 18 THE COURT: Well, based on that, I'll grant
01:40:23 19 Defendants' Motion in Limine No. 5 as recited into the
01:40:25 20 record.

01:40:30 21 Although as purely an aside, I'll observe that if
01:40:30 22 you're going to ask this panel has anybody ever been in a
01:40:33 23 family law matter or divorce, you're probably going to get
01:40:36 24 every hand on the panel that's going to go up. And if you
01:40:39 25 want to spend your entire time pursuing this, that's your

01:40:43 1 choice.

01:40:43 2 But Defendants' Motion in Limine No. 5, as
01:40:46 3 indicated, is granted.

01:40:47 4 MR. CHO: Thank you, Your Honor.

01:40:48 5 THE COURT: What about the status of Defendants'
01:40:51 6 Motion in Limine No. 6?

01:40:55 7 Is there an agreement here, or do we have a
01:40:58 8 dispute?

01:40:58 9 MR. LERNER: Your Honor, Jeff Lerner for
01:41:00 10 Defendants. There's still a dispute.

01:41:02 11 THE COURT: Tell me what your position is then.

01:41:04 12 MR. LERNER: As Your Honor mentioned, this case is
01:41:06 13 already complicated. Three asserted patents, a number of
01:41:09 14 asserted claims, many accused products. And what we're
01:41:12 15 trying to exclude through this is evidence and argument
01:41:17 16 about infringement or willful infringement based on things
01:41:21 17 that are not accused products.

01:41:23 18 To give an example, for willfulness, Solas appears
01:41:29 19 to be intending to rely on a claim chart prepared by a
01:41:34 20 patent broker concerning products at LG, not products that
01:41:39 21 contain any parts supplied by Samsung Display or Samsung
01:41:46 22 Electronics, that were provided to Samsung Electronics when
01:41:48 23 the patent broker was seeking to sell that portfolio.

01:41:52 24 These were not in any interrogatory response on
01:41:54 25 willful infringement. And we asked what would be the

01:41:58 1 factual basis. They're not in an expert report. And
01:42:01 2 there's no connection between the LG products and the
01:42:05 3 accused products. We're trying to avoid these kinds of
01:42:08 4 references to other companies' products that would be
01:42:11 5 highly prejudicial and also would be problematic because
01:42:17 6 they didn't apply the Court's claim constructions. They
01:42:22 7 rely on technical evidence that won't be available to the
01:42:25 8 jury. They wouldn't be relevant at all.

01:42:28 9 We believe that to the extent Solas says it would
01:42:29 10 have marginal reference to knowledge of the patents, it
01:42:31 11 would be far outweighed by the undue prejudice.

01:42:33 12 The other materials are part of the infringement
01:42:38 13 case. As Your Honor has ruled, we cannot seek a judgment
01:42:44 14 of non-infringement of some of the Apple accused products,
01:42:46 15 but Solas has arguments that accused products infringe
01:42:53 16 because they did a teardown of a later Apple product that
01:42:58 17 was never accused on the '450 patent.

01:43:01 18 And like I mentioned, to get into the details and
01:43:05 19 the ins and outs of unaccused products by other companies
01:43:09 20 would be problematic. This is where what we would -- what
01:43:12 21 we believe would be appropriate is for the Court to
01:43:14 22 exercise its gatekeeping function.

01:43:16 23 To the extent there's any relevance to these, we
01:43:19 24 think it would be far outweighed by the risk of confusion
01:43:22 25 and prejudice because there'd have to be evidence and

01:43:25 1 argument about how non-accused third-party products relate
01:43:29 2 or don't relate to accused products. And we're trying to
01:43:32 3 avoid that side show through this motion in limine.

01:43:36 4 So that's -- that's the thrust of our argument on
01:43:38 5 this, Your Honor.

01:43:40 6 THE COURT: Let me hear from the Plaintiff.

01:43:41 7 MR. BUCZKO: First, Your Honor, with regard to the
01:43:51 8 infringement charts. So those were documents that were in
01:43:57 9 Samsung's possession, which mentioned the patents-in-suit,
01:43:59 10 the '450 and '338 patents, and mapped the patents to OLED
01:44:06 11 smartphone products. The accused products in this case are
01:44:08 12 OLED smartphone products.

01:44:11 13 So at the very least, this puts -- and our
01:44:15 14 argument would be under inquiry notice that its products
01:44:18 15 may similarly infringe those patents.

01:44:20 16 Now, this was heavily addressed in the motion for
01:44:23 17 summary judgment with regard to willful infringement that
01:44:25 18 Your Honor denied earlier this morning. So this is part of
01:44:31 19 the facts, part of the narrative, part of the totality of
01:44:35 20 circumstances that must be taken into account when the jury
01:44:42 21 decides willful infringement. I heard something about
01:44:44 22 undue prejudice, but I didn't hear what that undue
01:44:48 23 prejudice is.

01:44:48 24 The jury is not going to be confused. The jury is
01:44:51 25 going to know that those are not Samsung products. Samsung

01:44:55 1 is -- has its non-infringement arguments in this case.

01:44:58 2 They're going to be shown simply for the fact that Samsung

01:45:01 3 was put on notice of the '338 and '450 patents, and they're

01:45:05 4 relevant to OLED smartphone products.

01:45:10 5 Now, with regard to the iPhone product, this is

01:45:12 6 another situation where this is something that was in

01:45:17 7 Mr. Credelle's opening report on -- in Paragraph 137. And

01:45:22 8 so what he does is he relies on Samsung testimony and with

01:45:28 9 regard to how the manufacturing lines of certain products

01:45:32 10 relate to each other.

01:45:33 11 And we only -- he only had evidence for that

01:45:36 12 particular point on the iPhone product, but he tied it to

01:45:40 13 the accused product with the Samsung testimony about how

01:45:43 14 they use the same manufacturing line.

01:45:45 15 And so -- and this was a reasoned opinion that was

01:45:48 16 in his report that was not challenged or in the Daubert or

01:45:51 17 motion to strike process. Again, I heard insistence that

01:45:58 18 there's prejudice, but I don't know what the real prejudice

01:46:01 19 is to Samsung in this regard. And in any event, they

01:46:04 20 didn't move to strike it or move under Daubert to exclude

01:46:06 21 it.

01:46:11 22 And I think that addresses all of counsel's

01:46:13 23 points.

01:46:14 24 THE COURT: All right. Well, I'm not sure that

01:46:16 25 this is not, again, a camouflaged dispute over

01:46:21 1 admissibility of exhibits, but I'm going to address it
01:46:24 2 nonetheless.

01:46:24 3 With regard to the Samsung charts that are mapped
01:46:50 4 to other products, notwithstanding that they may mention
01:46:55 5 one or more of the asserted patents, I just think that
01:47:05 6 under a 403 analysis, the probative value there is
01:47:09 7 outweighed by the prejudicial effect and outweighed by the
01:47:14 8 likelihood of confusion with the jury.

01:47:18 9 For the same reason, we've already talked about
01:47:29 10 other patents that are not asserted in this case, and I've
01:47:32 11 made it clear that there's a high risk of confusion if
01:47:36 12 unasserted patents are made a part of this trial.

01:47:45 13 So now it seems like Solas wants to use some of
01:47:51 14 Samsung's other patent documents to try to show a
01:47:54 15 contradictory position with regard to the claim language
01:47:57 16 regarding edge under the '311 patent. I think that's -- I
01:48:04 17 think the use of other patents and other patent documents
01:48:06 18 other than the three asserted patents in this case is
01:48:09 19 highly risky and dangerous. And but for advanced leave
01:48:18 20 having been granted by the Court, I don't see a basis to
01:48:21 21 allow those.

01:48:23 22 The same thing on the Apple and Sony products.
01:48:30 23 The probative value of those seems to me to be minimal.
01:48:38 24 Mr. Credelle uses Samsung products. I think there's a
01:48:40 25 clear risk of confusion.

01:48:46 1 Long story short, counsel, I'm going to grant
01:48:49 2 Defendants' Motion in Limine No. 6. If there's a logical
01:48:55 3 and non-confusing and probative basis to seek leave from
01:48:59 4 the Court to go into any of this during the course of the
01:49:03 5 trial when the Court has the benefit of the evidence has
01:49:08 6 been actually presented and developed, you certainly have
01:49:10 7 leave to seek -- you have permission to seek leave from the
01:49:13 8 Court at that time.

01:49:14 9 But without -- without the benefit of that and as
01:49:18 10 I sit here in advance of the trial beginning, I see more
01:49:27 11 prejudice than I do probative value.

01:49:29 12 So on that basis, I'm going to grant Defendants'
01:49:32 13 MIL No. 6.

01:49:33 14 Let's go to Defendants' MIL No. 7.

01:49:36 15 Do we have any agreement here?

01:49:37 16 MR. HASLAM: No, Your Honor.

01:49:39 17 THE COURT: Then tell me what your position is,
01:49:42 18 Mr. Haslam.

01:49:42 19 MR. HASLAM: Yes, sir. This relates to the
01:49:44 20 relationship between Samsung and Atmel. It's being offered
01:49:50 21 to go to the issue of copying and willfulness. And we
01:49:54 22 believe under the caselaw and under 403 that the probative
01:50:02 23 value of what they want to argue is far outweighed by the
01:50:05 24 facts and far outweighed by the prejudice.

01:50:09 25 First of all, there's no evidence that the

01:50:11 1 patent -- the '311 patent, the patent application was ever
01:50:13 2 made known to Samsung or that Atmel ever provided a copy of
01:50:19 3 the issued patent because at the time the patent issued,
01:50:26 4 Atmel had already sold its business.

01:50:28 5 So any dealings with Atmel on other products post
01:50:32 6 the sale of the Atmel business, including the touch sensor
01:50:36 7 business, would be irrelevant.

01:50:39 8 They cite the Liqwd case, and that case, I think,
01:50:45 9 is different. In that case, somebody -- a competitor
01:50:51 10 entered into an NDA with a patentee, were shown the patent
01:50:54 11 application, had discussions and access to confidential
01:50:59 12 information, and then their product turned out to have one
01:51:03 13 of the key ingredients mentioned in the patent and the
01:51:06 14 technical documents.

01:51:07 15 And in that case, the Court -- the board had found
01:51:10 16 that there was copying, but then ignored it, and that's
01:51:14 17 what the reversal was on.

01:51:15 18 But I think the discussion in that case leading up
01:51:17 19 to its result is very instructive for here. The vice that
01:51:25 20 the Liqwd Court talked about is we do not want every
01:51:29 21 infringement case to turn into an argument, essentially
01:51:31 22 because you infringe, you must have copied. And that's
01:51:39 23 essentially what they're trying to argue here.

01:51:40 24 And the reason I don't think it's probative at all
01:51:43 25 is, remember, their invention was a flexible substrate with

01:51:48 1 a touch sensor on it that they said was configured to wrap
01:51:50 2 around the display.

01:51:56 3 Samsung's initial products were ITO, which the
01:51:58 4 patent and the patentee said specifically was what they
01:52:01 5 were trying to avoid. And then the follow-on products
01:52:06 6 which are accused of infringement, those ITO products are
01:52:09 7 not accused of infringement, the next products are arguably
01:52:17 8 different. The jury is going to decide, but those are the
01:52:20 9 ones that have the integrated touch sensor directly on the
01:52:22 10 display and do away with the flexible substrate.

01:52:24 11 So there is no copying of anything that Atmel did
01:52:29 12 and --

01:52:30 13 THE COURT: Doesn't this go to the willfulness
01:52:32 14 issue, to your knowledge, to your understanding of the
01:52:35 15 technology and the art?

01:52:42 16 MR. HASLAM: But what's the relevance of that
01:52:44 17 since -- since the first products that we came out with
01:52:46 18 after this alleged arrangement with Atmel used the very
01:52:54 19 substance that they were trying to design around, an ITO
01:52:54 20 product?

01:52:58 21 Their patent criticizes ITO. Says you can't --
01:53:00 22 you really -- you can't use it. It's not flexible enough,
01:53:03 23 so we're coming up with this flexible substrate.

01:53:07 24 If we had used something that -- of their
01:53:08 25 technology, I might be -- I might not even be making this

01:53:11 1 argument, but we didn't.

01:53:13 2 We have two differences. The jury may disagree
01:53:16 3 with the second, the later products, but those are so far
01:53:20 4 downstream to think that the -- the relationship with Atmel
01:53:23 5 during the time that Atmel had this technology and owned
01:53:27 6 the patent, which they sold in 2015 for products that came
01:53:31 7 out later, 2018, I think the -- it is extremely tenuous to
01:53:39 8 say that somehow what we did in 2012 and '13 and '14 and
01:53:44 9 maybe '15, somehow we copied it as our second iteration of
01:53:51 10 product which has a patented difference, which is a unitary
01:53:52 11 display touch sensor.

01:53:53 12 THE COURT: Well, there -- there may be no basis
01:53:55 13 upon which to urge copying, but the knowledge that would
01:54:04 14 open the door to copying is also the knowledge that would
01:54:08 15 go to the state of mind of the Defendant. I mean, the same
01:54:15 16 evidence can be probative for a valid reason, and it might
01:54:17 17 not be probative for an invalid reason.

01:54:20 18 I'm not saying I disagree with your arguments on
01:54:22 19 copying. I'm just not sure that for other live issues in
01:54:26 20 the case it's still not probative.

01:54:28 21 MR. HASLAM: Well, it's -- it's not from knowledge
01:54:30 22 of the patent because they never told us about the patent,
01:54:34 23 as far as I know. If I'm wrong, they can get up and tell
01:54:36 24 me I'm wrong. But this was a business relationship.
01:54:39 25 There's -- there's no dispute --

01:54:41 1 THE COURT: Let me hear from the Plaintiff.

01:54:42 2 MR. HASLAM: Yeah, okay.

01:54:51 3 THE COURT: What's Plaintiff's posture?

01:54:53 4 MR. HOFFMAN: We think Your Honor has it exactly

01:54:55 5 right, and this is basically the motion the Court has

01:54:58 6 already rejected both under their MIL on secondary indicia

01:55:03 7 and on willfulness.

01:55:04 8 These are -- this is a motion to exclude opinions

01:55:07 9 from experts that they didn't move to Daubert on. And so,

01:55:13 10 for example, Mr. Credelle in his June report has in

01:55:16 11 Paragraph 95 a discussion of inducement and knowledge as it

01:55:20 12 relates to inducement and has a paragraph talking about

01:55:24 13 this Atmel evidence. And they did not move to exclude

01:55:27 14 that.

01:55:27 15 We already had -- actually had a significant

01:55:31 16 discussion of secondary indicia. He has several paragraphs

01:55:36 17 talking about this issue that they did not move to exclude.

01:55:40 18 And the -- the Court has rejected their motion to exclude

01:55:44 19 that opinion.

01:55:46 20 Mr. Dell cites that -- that -- these discussions

01:55:51 21 in his report. And their own expert, Mr. Martinez, talks

01:55:56 22 about this relationship, as well.

01:56:00 23 May I have the document camera?

01:56:11 24 So in Paragraph 43, he talks about this

01:56:13 25 relationship between SDC and Atmel and is using it

01:56:19 1 essentially to disparage the Atmel product or the -- to
01:56:22 2 disparage the -- the product that Atmel put out saying SDC
01:56:26 3 tried it and rejected it.

01:56:28 4 So we have several different experts addressing
01:56:30 5 this issue, including their own, and they should have
01:56:32 6 brought this as a Daubert if they thought that this was an
01:56:35 7 unreasonable position.

01:56:36 8 Secondly, as -- as your Court -- as Your Honor
01:56:39 9 notes, the fact that they -- that the -- this is evidence
01:56:46 10 that they were on notice and knew about this technology.
01:56:51 11 They knew that Atmel was developing this technology. They
01:56:54 12 had a relationship with Atmel through 2015.

01:56:57 13 They act as if the act then of putting out product
01:57:02 14 that implemented the knowledge that they got from Atmel was
01:57:05 15 some years later is, of course, not true. The first
01:57:08 16 accused product in this case is 2016. That's the date of
01:57:11 17 the hypothetical negotiation. Actually, maybe it's 20 --
01:57:17 18 2017. Thank you.

01:57:17 19 So we're talking about a two-year difference.
01:57:19 20 And, of course, one can get knowledge from a business
01:57:22 21 relationship. And the fact that one then goes on to put
01:57:24 22 out -- continue to put out non-copied products for a couple
01:57:27 23 of years and then implements the knowledge that one
01:57:30 24 obtained is not evidence that -- that the evidence of that
01:57:33 25 relationship and how they received information about the

01:57:40 1 Atmel products is not relevant. It is relevant to
01:57:44 2 willfulness -- it is because -- both because of copying and
01:57:47 3 because it put them on notice that Atmel had technology.
01:57:50 4 Atmel had already applied for the patent during that
01:57:53 5 period. And so they -- they were on notice that Atmel had
01:57:57 6 both the technology and should have been on notice to -- if
01:58:01 7 they were going to use that technology to have an inquiry
01:58:04 8 notice to make sure they weren't using patented technology.

01:58:06 9 THE COURT: All right. I've heard enough.

01:58:11 10 I'm -- I'm going to deny Defendants' Motion in
01:58:14 11 Limine No. 7. And I do think there is support for the
01:58:18 12 argument that it should have been raised as a part of the
01:58:21 13 Daubert practice. That's denied.

01:58:26 14 Let's go to Defendants' Motion in Limine No. 8.

01:58:29 15 Let me just make it clear, counsel, nobody is
01:58:29 16 going to present argument to this jury inconsistent with
01:58:37 17 this Court's claim construction opinion.

01:58:37 18 MR. HASLAM: I was about to withdraw --

01:58:40 19 THE COURT: Order in limine or no order in limine,
01:58:42 20 that's not going to happen.

01:58:44 21 MR. HASLAM: Right. I was withdrawing that.

01:58:47 22 THE COURT: All right. Defendants' No. 8 is
01:58:49 23 withdrawn.

01:58:49 24 What about Defendants' No. 9?

01:58:52 25 MR. LERNER: Your Honor, Jeff Lerner for

01:58:54 1 Defendants.

01:58:54 2 This one is still live, although based on the
01:58:57 3 Court's ruling yesterday on the motion to strike on
01:59:00 4 Mr. Dell, it's narrowed. We're -- we understand the
01:59:04 5 Court's ruling about the 2005 UDC agreement. And so I'm
01:59:07 6 not going to reargue that.

01:59:09 7 THE COURT: Tell me what you think is left here,
01:59:11 8 Mr. Lerner.

01:59:11 9 MR. LERNER: It's the other two -- well, it's the
01:59:18 10 other UDC agreements is what it comes down to.

01:59:20 11 There are the 2011 and 2018 agreements with
01:59:26 12 Samsung Display, and then there are agreements between UDC
01:59:28 13 and other unrelated parties, like universities, Princeton,
01:59:35 14 U.S.C., Michigan. Some were in licensing. They were UDC
01:59:38 15 licensing other people's patents.

01:59:42 16 And for all of these, the common thread is there's
01:59:44 17 no technical comparability opinion. Mr. Credelle --
01:59:51 18 setting aside 2005, he doesn't offer any opinions about the
01:59:56 19 portfolios that were licensed these other agreements. And
02:00:00 20 without that foundation, these are highly prejudicial. For
02:00:06 21 the -- the ones with Samsung Display --

02:00:08 22 THE COURT: Let me ask you this, Mr. Lerner. To
02:00:10 23 the extent Defendants brought a motion under Daubert with
02:00:17 24 regard to Mr. Dell and the Court considered and ruled on
02:00:21 25 that, why were these things you're now urging not made a

02:00:26 1 part of that motion? Were they were there, and I just
02:00:29 2 didn't rule on them, or did you fail to include them in the
02:00:32 3 Daubert motion that the Court took up yesterday?

02:00:34 4 MR. LERNER: We didn't include them because, Your
02:00:36 5 Honor, the opinion that he rendered was based on the 2005
02:00:38 6 agreement, and that was what we moved to strike.

02:00:42 7 There were the two pieces. The hypothetical
02:00:43 8 negotiation date, he said it was 2008. And this is a 2011
02:00:47 9 and 2018 license.

02:00:49 10 But mainly it was the UDC, which we argued was
02:00:53 11 non-comparable. That's the basis for his royalty opinions.
02:00:55 12 That's the only one that has a running royalty. And these
02:00:58 13 other ones in the other UDC agreements were just in his
02:01:03 14 report as kind of comparators. And that's part of the
02:01:07 15 prejudice.

02:01:07 16 He says: My opinions are based on the 2005, and
02:01:11 17 look at these other numbers. Look at the rates that UDC
02:01:15 18 agreed to with the university and some other unrelated
02:01:19 19 agreement. Look at this. Look at that.

02:01:21 20 But that's not the methodology that got to his
02:01:23 21 opinion. And that, Your Honor, is why this was not in our
02:01:26 22 motion to strike. We thought the motion to strike would
02:01:28 23 have addressed the opinion. We understand Your Honor's
02:01:31 24 ruling, but that's why we took these up separately.

02:01:34 25 And we believe that they're highly prejudicial,

02:01:38 1 particularly the ones that don't involve any Defendant in
02:01:41 2 agreement between UDC and U.S.C., a university, in
02:01:47 3 licensing patents. It doesn't involve any of the same
02:01:49 4 parties. There's no technical comparability opinion. It
02:01:52 5 would be highly prejudicial. So --

02:01:54 6 THE COURT: All the kind of things that should be
02:01:56 7 urged as a Daubert motion. I mean, that's how you
02:01:58 8 challenge an expert witness's report as to relevance,
02:02:03 9 probity, prejudice, reliability, proper methodology. And
02:02:07 10 you brought a Daubert motion, and these things were in his
02:02:11 11 report when you brought them. You didn't attack them in
02:02:15 12 that motion, and now you want me to address them as a
02:02:18 13 motion in limine. That's just not proper, Mr. Lerner.

02:02:21 14 This is denied.

02:02:27 15 All right. Defendants' Motion in Limine -- Limine
02:02:31 16 No. 10.

02:02:31 17 What's the status of this, counsel?

02:02:34 18 MR. CHO: Daniel Cho on behalf of Defendants, Your
02:02:37 19 Honor. I'm pleased to report we have agreements on all
02:02:41 20 remaining MILs. I'm happy to read them into the record.

02:02:41 21 THE COURT: Well, let's start with No. 10 and let
02:02:43 22 you tell me what those agreements are.

02:02:48 23 MR. CHO: Motion in Limine No. 10: Solas will not
02:02:51 24 discuss Defendants' overall size, wealth, number of
02:02:54 25 employees, and the total revenues or profits from

02:02:55 1 Defendants' sale of end user mobile phone products that are
02:02:57 2 not accused in this case, including non-accused Galaxy
02:03:02 3 mobile phone products.

02:03:02 4 THE COURT: Does Plaintiff concur with that
02:03:06 5 representation?

02:03:06 6 MS. HENRY: Yes, Your Honor.

02:03:07 7 THE COURT: Then as agreed to on the record by the
02:03:10 8 parties, the Court grants Defendants' Motion in Limine No.
02:03:14 9 10 as announced into the record.

02:03:15 10 What's next, counsel?

02:03:17 11 MR. CHO: Motion in Limine No. 11: Solas cannot
02:03:21 12 create any negative inferences or imply that Defendants
02:03:23 13 were willful because they did not obtain an opinion of
02:03:26 14 counsel letter. Solas cannot present any argument,
02:03:29 15 evidence, testimony, insinuation, reference, or assertion
02:03:33 16 that Defendants had a duty to obtain opinion of counsel but
02:03:36 17 is not precluded from mentioning that Defendants did not
02:03:40 18 seek opinion of counsel.

02:03:41 19 THE COURT: Do Plaintiffs concur with the accuracy
02:03:43 20 of that representation?

02:03:44 21 MS. HENRY: Yes, Your Honor.

02:03:45 22 THE COURT: Then based on the agreement of the
02:03:47 23 parties, the Court grants Defendants' Motion in Limine No.
02:03:51 24 11 as announced into the record.

02:03:54 25 Defendants' Motion in Limine No. 12, what's the

02:03:56 1 status of this, counsel?

02:03:57 2 MR. CHO: No party shall refer to another as
02:04:00 3 litigious or refer to the number of lawsuits brought by or
02:04:05 4 against any party or any prior jury verdict for or against
02:04:09 5 a party without first approaching the bench.

02:04:12 6 THE COURT: Do Plaintiffs join in that being
02:04:14 7 offered as an agreed limine?

02:04:17 8 MS. HENRY: Yes, Your Honor.

02:04:18 9 THE COURT: Then based on the agreement of the
02:04:19 10 parties, the Court grants Defendants' Motion in Limine No.
02:04:22 11 to the extent and as announced into the record.

02:04:24 12 Defendants' No. 13, counsel?

02:04:27 13 MR. CHO: Solas will not be precluded from
02:04:29 14 mentioning the presumption of validity of issued patents
02:04:33 15 but may not make repetitive references to such presumption.

02:04:38 16 THE COURT: Do Plaintiffs concur with that as an
02:04:40 17 agreed resolution of Defendants' MIL 13?

02:04:43 18 MS. HENRY: Yes, Your Honor.

02:04:43 19 THE COURT: Then based on the agreement of the
02:04:45 20 parties, the Court grants Defendants' Motion in Limine No.

02:04:50 21 13 to the extent and as announced into the record.

02:04:54 22 Are there other motion in limine disputes between
02:04:57 23 the parties that the Court has not heard or otherwise ruled
02:05:00 24 on? There do not appear to be any others in what I have
02:05:04 25 before me, but I just want to check and make sure I'm not

02:05:08 1 missing anything.

02:05:08 2 MR. HASLAM: Bob Haslam for Samsung. None from
02:05:12 3 us, Your Honor.

02:05:12 4 THE COURT: Anything from Plaintiff?

02:05:13 5 MS. HENRY: No, Your Honor.

02:05:14 6 THE COURT: All right. A couple of questions,
02:05:17 7 counsel.

02:05:20 8 If you will, have a seat, Mr. Haslam.

02:05:23 9 MR. HASLAM: Yes.

02:05:24 10 THE COURT: Obviously, the third leg of this stool
02:05:26 11 are the exhibits where there are a material number of
02:05:33 12 disputes. The parties now have before them the Court's
02:05:36 13 guidance on the dispositive motions and the Court's
02:05:41 14 guidance on the motions in limine.

02:05:43 15 With the benefit of that, you should be able to
02:05:45 16 substantially, if not completely, resolve the disputes on
02:05:48 17 the proposed exhibits to be pre-admitted as a part of this
02:05:54 18 trial.

02:05:54 19 I have on my calendar reserved beginning at 10:00
02:06:02 20 o'clock on Monday the 28th of September a time to take up
02:06:10 21 exhibit disputes if there are any surviving. I'm going to
02:06:15 22 recess in a few minutes. I'm going to expect to have you
02:06:21 23 back before me at 10:00 a.m. on September 28th, being a
02:06:27 24 Monday, unless you advise me between now and then that
02:06:29 25 you've resolved all exhibit disputes, in which case you

02:06:33 1 won't need to reappear on the 28th.

02:06:36 2 But against the possibility that that won't
02:06:38 3 happen, you need to reserve that time and be prepared to
02:06:41 4 take up with the Court the issues of admissibility as to
02:06:44 5 any challenged pre-admitted exhibits on the 28th of
02:06:48 6 September.

02:06:49 7 Also, counsel -- I'm not sure we'll be in this
02:07:08 8 courtroom. We'll be somewhere. It may be that my
02:07:10 9 Magistrate Judge is using this courtroom that morning,
02:07:13 10 which is why my dutiful courtroom deputy turned and looked
02:07:18 11 at me to remind me I had not mentioned that. We'll be in
02:07:21 12 this courthouse someplace. You won't -- you won't have
02:07:24 13 trouble finding us, but reserve the 28th beginning at 10:00
02:07:30 14 o'clock for that purpose.

02:07:31 15 Also, as I read the jointly submitted pre-trial
02:07:34 16 order, all the issues in this case, as they've now been
02:07:38 17 refined and narrowed through the pre-trial process, are
02:07:42 18 appropriate for submission to the jury for resolution.
02:07:46 19 Neither side has requested any argument before the Court by
02:07:51 20 way of a bench trial for any issue that might be required
02:07:55 21 to be tried to the bench.

02:07:56 22 I just want to make sure on the record that that
02:07:59 23 is accurate. That's my understanding, and I'm not
02:08:01 24 anticipating having any bench trial in association with
02:08:04 25 this jury trial. If that's not right, somebody let me

02:08:08 1 know. Again, that's from my reading of your jointly
02:08:13 2 submitted pre-trial order.

02:08:21 3 MR. HASLAM: Just confer with my co-counsel,
02:08:24 4 please?

02:08:24 5 THE COURT: Take a -- take a moment. I want to
02:08:27 6 be -- I want to be sure we're accurate on this.

02:08:31 7 MS. HENRY: Your Honor, just to confirm, Plaintiff
02:08:34 8 doesn't have any issues that it believes should be tried in
02:08:38 9 front of the bench, but we've obviously waiting to hear if
02:08:42 10 Defendants do.

02:08:43 11 THE COURT: All right. Thank you, Ms. Henry.

02:08:45 12 MR. HASLAM: Your Honor, Bob Haslam for Samsung.

02:08:48 13 We have an inequitable conduct claim that I think
02:08:52 14 we are continuing to evaluate, but I think given the
02:08:56 15 Court's request right now, I think at this point, we're not
02:09:01 16 prepared to drop that.

02:09:04 17 THE COURT: Are you telling me that this is
02:09:05 18 something you're continuing to evaluate, and you'll reach a
02:09:10 19 final decision before we go to trial --

02:09:12 20 MR. HASLAM: Yes.

02:09:13 21 THE COURT: -- before the jury?

02:09:15 22 MR. HASLAM: Yes, Your Honor, and we'll be
02:09:17 23 conferring with our client about this.

02:09:18 24 THE COURT: All right. Well, I'll give you --
02:09:20 25 I'll give you some additional time to do that. I need to

02:09:24 1 know before we go to trial and pick the jury if I need to
02:09:26 2 deal with a bench trial issue.

02:09:31 3 MR. HASLAM: Your Honor, I would like --

02:09:32 4 THE COURT: Let's -- let's say this, Mr. Haslam.

02:09:34 5 I've given you a deadline by which to deliver the juror
02:09:38 6 notebooks to the Court in anticipation of the jury trial.

02:09:40 7 Just consider that the same deadline to let me know yes or
02:09:45 8 no on this inequitable conduct issue.

02:09:47 9 MR. HASLAM: Will do, Your Honor.

02:09:48 10 THE COURT: Okay. All right.

02:09:48 11 MR. HASLAM: While I'm at -- I'm not sure what the
02:09:51 12 metaphor is to preface what I'm about to request, but I
02:09:55 13 would like to request an opportunity to file a supplemental
02:09:59 14 report within one week, no longer than the length of
02:10:04 15 Mr. Credelle's report on whether or not the '311 patent is
02:10:08 16 reduced to practice. I raised it with counsel who's now on
02:10:13 17 a plane, so I don't know whether -- I assume he's raised it
02:10:17 18 with someone on their side.

02:10:19 19 THE COURT: So you're making a spontaneous request
02:10:22 20 to supplement an expert's report at this late date?

02:10:25 21 MR. HASLAM: Yes, I am, Your Honor.

02:10:28 22 THE COURT: What's the position of the Plaintiff
02:10:30 23 on this?

02:10:30 24 MR. RUBIN: Your Honor, the Plaintiff opposes
02:10:35 25 their request, and I'm happy to explain why.

02:10:42 1 THE COURT: Let's do this. Put it in writing,
02:10:45 2 Mr. Haslam, and get it filed within 24 hours. And let me
02:10:50 3 have a response in writing from the Plaintiff, Mr. Rubin,
02:10:54 4 within 24 hours of that time.

02:10:56 5 MR. RUBIN: Thank you, Your Honor.

02:10:56 6 THE COURT: And then I'll have the benefit of what
02:10:58 7 you're actually asking for and how you're responding to it,
02:11:02 8 and then I'll get you some guidance.

02:11:04 9 Anything else from either party before we complete
02:11:07 10 the pre-trial process but for exhibit disputes, as I
02:11:10 11 mentioned?

02:11:11 12 MR. HASLAM: Given -- given what the Court said
02:11:13 13 about the joint pre-trial order that's before the Court
02:11:17 14 setting the parameters, actually, I'm going to raise this
02:11:21 15 even though I think it's something that the Plaintiff
02:11:23 16 should be raising.

02:11:25 17 There are a set number of claims that are listed
02:11:28 18 in the pre-trial order as the ones they're going to trial
02:11:33 19 on. Yesterday morning, counsel, again, one who has left,
02:11:38 20 informed us that they wanted to add back three claims to
02:11:43 21 the '311 patent, Claims 1, 2, and I forget what the other
02:11:46 22 one --

02:11:47 23 THE COURT: Claims that had previously been
02:11:48 24 asserted and then dropped or claims that never been
02:11:51 25 asserted?

02:11:52 1 MR. HASLAM: Previously been asserted that were
02:11:54 2 not in the J -- in the joint pre-trial order. But we were
02:11:57 3 then told that within 24 or 48 hours of the ruling on the
02:12:02 4 MILs, they would reduce it to four. So I just want to -- I
02:12:09 5 just want to make sure that we understand at what point in
02:12:12 6 time we're going to know exactly what claims we're going to
02:12:15 7 trial on.

02:12:15 8 THE COURT: Well, it's time for the moving target
02:12:17 9 to stop moving, both on the claim side and on the
02:12:21 10 invalidating references side. Those things -- I mean,
02:12:25 11 we're -- we're a matter of a couple weeks away from jury
02:12:30 12 selection, maybe three weeks away from jury selection. I'm
02:12:39 13 not prepared to grant either side any latitude over and
02:12:42 14 above what's in the pre-trial order unless I'm presented
02:12:44 15 with some compelling reason.

02:12:48 16 If you have something, Mr. Rubin, tell me about
02:12:50 17 it.

02:12:51 18 MR. RUBIN: Thank you, Your Honor.
02:12:53 19 We just voluntarily and spontaneously reduced the
02:13:01 20 number of claims that we were asserting in the pre-trial
02:13:04 21 order that was submitted last week. And in a good faith
02:13:09 22 attempt to reduce the issues in the case, we substantially
02:13:11 23 reduced the number of claims that we were asserting. And
02:13:15 24 we've realized that we would -- we'd like to change the
02:13:21 25 claims that we elected for just the '311 patent.

02:13:26 1 So we reduced from, I think, over a dozen claims
02:13:29 2 down to three, and we'd like to make some adjustments to
02:13:33 3 that.

02:13:33 4 And in addition, we would like to further reduce
02:13:35 5 the total number of claims that are live in the case from
02:13:38 6 the seven that are in the pre-trial order to a total of
02:13:42 7 four, and we're prepared to do that within 48 hours.

02:13:46 8 So -- and I think, you know, any prejudice to
02:13:53 9 Defendants for thinking that it was this seven claims for
02:13:57 10 about a week and then the claims on one of the patents
02:14:01 11 changing a little bit, I think, is really minimal. And,
02:14:06 12 Your Honor, I think that we've -- we've acted in good faith
02:14:10 13 to really genuinely try to narrow the --

02:14:15 14 THE COURT: When did the spirit move on this,
02:14:17 15 Mr. Rubin?

02:14:17 16 MR. RUBIN: So --

02:14:18 17 THE COURT: I mean, we've been in pre-trial for
02:14:23 18 two days now. Did this just dawn upon you last night or at
02:14:28 19 lunch today or what?

02:14:29 20 MR. RUBIN: Your Honor, the issue came up
02:14:31 21 yesterday, and my partner, Mr. Mirzaie, raised the issue
02:14:37 22 with Defendants. I don't know exactly when that
02:14:39 23 conversation happened, but I think it was quite promptly
02:14:43 24 after we recognized the issue.

02:14:44 25 MR. HASLAM: It was -- I was informed -- this is

02:14:46 1 Bob Haslam for Samsung. I was informed yesterday morning
02:14:49 2 about this request.

02:14:50 3 MR. RUBIN: So it was yesterday morning that we
02:14:53 4 recognized the issue.

02:14:54 5 THE COURT: Well, let me say this. To the extent
02:14:56 6 both sides can meet and confer and you're both persuaded
02:15:03 7 that you have something to gain by doing this and you
02:15:05 8 present it to me as an agreed motion, I'm probably not
02:15:08 9 going to say no.

02:15:09 10 But I'm not going to allow this kind of
02:15:14 11 last-minute change in position. Number one, it's a
02:15:18 12 surprise.

02:15:18 13 Number two, it -- it causes wasted resources by
02:15:26 14 counsel preparing for something that then disappears late,
02:15:30 15 late, late in the process. It -- it probably isn't here,
02:15:33 16 but in other context, it smacks of gamesmanship. It's just
02:15:38 17 not a good practice.

02:15:40 18 And there's got to be some finality to the issues
02:15:42 19 before the Court, and traditionally that's when we have the
02:15:46 20 pre-trial hearing so that I can air all the issues with
02:15:51 21 regard to the asserted claims and the asserted prior art
02:15:53 22 references and the Plaintiff's theories and the Defendants'
02:15:56 23 theories, and we can get everything resolved and cleared
02:15:59 24 for trial.

02:16:00 25 I'm just not prepared to say you can of your own

02:16:04 1 accord change your claims at this late date, counsel.

02:16:08 2 MR. RUBIN: And, Your Honor --

02:16:09 3 THE COURT: Now, if you can convince the

02:16:10 4 Defendants to join you and you think it's going to be as

02:16:13 5 beneficial to them to reduce the total down to four, have

02:16:18 6 at it as far as discussing it with opposing counsel.

02:16:21 7 But barring an agreement, I'm not likely to grant
02:16:24 8 an opposed motion to change the claims at this date.

02:16:28 9 MR. RUBIN: Your Honor, the change that we would
02:16:31 10 be making would be replacing one independent claim and its
02:16:35 11 dependence with another independent claim that largely
02:16:38 12 parallels the first but actually has fewer limitations. So
02:16:40 13 there would be fewer elements that either side would have
02:16:43 14 to prove in their cases.

02:16:44 15 We don't think that it -- it changes at all any of
02:16:46 16 the issues that have been --

02:16:46 17 THE COURT: Well --

02:16:48 18 MR. LERNER: -- addressed during pre-trial, but --

02:16:50 19 THE COURT: -- let me suggest to you -- let me
02:16:52 20 suggest to you that you try to persuade Mr. Haslam and his
02:16:55 21 side that this is beneficial to them, and see if you can
02:16:58 22 reach an agreement.

02:16:59 23 You're welcome to meet and confer with opposing
02:17:03 24 counsel about it. I am not prepared at this point to grant
02:17:05 25 Plaintiff or Defendant unilateral leave to change the

02:17:08 1 structure of the case, having just completed the pre-trial
02:17:11 2 process or -- or having completed it but for the exhibit
02:17:16 3 disputes -- substantially completed it.

02:17:19 4 We're -- we're not going to move the boundaries of
02:17:21 5 the playing field at this -- you know, the fourth quarter
02:17:24 6 of the game. But if -- if you and opposing counsel can
02:17:26 7 come to some joint resolution you think is beneficial and
02:17:30 8 both sides are in agreement, I'm happy -- I'm happy to hear
02:17:34 9 any agreements. It's getting late in the process to hear
02:17:39 10 unilateral disputes, especially when we just substantially
02:17:43 11 completed the pre-trial process.

02:17:44 12 So that's where the Court is. I will -- I will
02:17:48 13 consider that we're going forward on what I have in the
02:17:50 14 pre-trial order and what I've taken up during the pre-trial
02:17:55 15 hearing, unless I'm presented with something joint to
02:18:00 16 consider, all right?

02:18:01 17 MR. RUBIN: Understood, Your Honor.

02:18:02 18 THE COURT: Okay. Is there anything else? If
02:18:08 19 there's not, let me encourage you one more time to work
02:18:11 20 diligently to narrow if not completely resolve the exhibit
02:18:16 21 disputes. You should have adequate guidance from the Court
02:18:19 22 on those issues at this juncture.

02:18:22 23 But barring that complete resolution, I'll reserve
02:18:28 24 the time and the date for further efforts to take up
02:18:31 25 exhibit disputes as I've indicated.

02:18:33 1 All right. Counsel, that will complete the
02:18:37 2 pre-trial hearing in this matter for today.

02:18:41 3 The Court stands in recess.

02:18:42 4 COURT SECURITY OFFICER: All rise.

02:18:43 5 (Hearing concluded.)

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CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

7

8

9 /S/ Shelly Holmes _____
10 SHELLY HOLMES, CSR, TCRR
10 OFFICIAL REPORTER
11 State of Texas No.: 7804
11 Expiration Date: 12/31/20

9/23/2020
Date

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